REDACTED - FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas	))))))	WC Docket No. 07-97

INITIAL COMMENTS OF COVAD COMMUNICATIONS GROUP, NUVOX COMMUNICATIONS, AND XO COMMUNICATIONS, LLC

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Pursuant to the Public Notice issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding on July 6 , 2007,[1] Covad Communications Group, NuVox Communications, and XO Communications, LLC (hereinafter referred to jointly as "Commenters"), by their attorneys, hereby file their comments in response to the four petitions filed by Qwest Corporation ("Qwest") on April 27, 2007, pursuant to Section 10 of the Communications Act of 1934, as amended,[2] requesting that the Commission forbear from applying to Qwest certain obligations in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas ("MSAs").[3]

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1 *Wireline Competition Bureau Grants Extension of Time to File Comments on Qwest's Petitions for Forbearance in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97, Public Notice, DA 07-3042 (rel. Jul. 6, 2007).

2 *See* 47 U.S.C. § 160.

3 Qwest seeks forbearance from the loop and transport unbundling regulations contained in Sections 251(c)(3) and 271(c)(2)(B)(ii). Qwest also seeks forbearance from the dominant carrier tariff requirements set forth in Part 61 of the Commission's rules; from price cap regulations set forth in Part 61 of the Commission's rules; from the Computer III requirements, including Comparably Efficient Interconnection ("CEI") and Open Network Architecture ("ONA") requirements; and from dominant carrier requirements arising under Section 214 of the Act and Part 63 of the Commission's rule concerning the process for acquiring lines, discontinuing services, making assignments or transfers of

I. INTRODUCTION AND SUMMARY

The Commission should summarily dismiss Qwest's Petitions because the "evidence" submitted by Qwest to support its forbearance requests is not sufficiently detailed and market-specific to meet its burden of proof. Such shortcomings are particularly fatal here since Qwest should be very familiar with the evidentiary requirements for forbearance from its proceeding regarding forbearance in the Omaha MSA.[4] The Commission should not tolerate Qwest's intentional refusal to produce adequate evidence and should take such failure as an admission by Qwest that its Petitions are insufficient and should be dismissed.

If the Commission declines to dismiss the Petitions, it should deny Qwest the forbearance it seeks on the merits because Qwest clearly has not met the statutory prerequisites for forbearance contained in Section 10 of the Act. A grant of forbearance by the Commission is lawful only if the Qwest Petitions demonstrate that substantial actual facilities-based competition exists for each relevant product market, and within each relevant geographic market. The Qwest Petitions rely only on the most general information; Qwest does not proffer any of the market-specific data necessary to support its forbearance claims. Moreover, the Qwest Petitions

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control. *See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Colorado Metropolitan Statistical Area*, WC Docket No. 07-97 (filed Apr. 27, 2007), at 3-4 ("*Qwest Petition – Denver*"); *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Minneapolis-St. Paul, Minnesota Metropolitan Statistical Area*, WC Docket No. 07-97 (filed Apr. 27, 2007), at 3-4 ("*Qwest Petition – Minneapolis*"); *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 07-97 (filed Apr. 27, 2007), at 3-4 ("*Qwest Petition – Phoenix*"); *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Seattle, Washington Metropolitan Statistical Area*, WC Docket No. 07-97 (filed Apr. 27, 2007), at 3-4 ("*Qwest Petition – Seattle*").

4 *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) ("*Omaha Forbearance Order*"), *aff'd Qwest Corporation v. Federal Communications Commission*, Case No. 05-1450, (D.C. Cir. Mar. 23, 2007).

improperly rely on overly general information, including line loss and market coverage figures, without providing any data regarding the actual market presence of competing telecommunications service providers.

With regard to Qwest's requests for relief from Part 61 dominant carrier tariffing requirements; dominant carrier requirements under Section 214 of the Act and Part 63 of the Commission's rules; and the Commission's *Computer III* requirements, including CEI and ONA requirements, the Qwest Petitions lack *any* analysis of the statutory requirements of Section 10. Significantly, the Petitions do not address whether Qwest maintains market power within the markets subject to its forbearance requests, nor do the Petitions discuss supply and demand elasticities, or Qwest's costs, resources, structure and size within those markets. Absent any such analysis, a grant of forbearance by the Commission for those non-Section 251 dominant carrier obligations is not justified.

The Commission must consider whether a grant of forbearance would leave providers of competing telecommunications services without meaningful wholesale alternatives, including the network facilities and services that Qwest must offer pursuant to Section 271 of the 1996 Act. Qwest has sought to evade its Section 271 obligations. Moreover, Qwest fails to negotiate in good faith commercial contracts that govern the rates, terms, and conditions of its Section 271 offerings. At bottom, Qwest has not shown that its treatment of its obligations under Section 271 would provide a sufficient backstop to protect consumers and competition if Section 251(c)(3) unbundling were to be granted by the Commission.

It is also clear that the Qwest Petitions are not consistent with the public interest, and therefore do not satisfy the third prong of the Section 10(a) test. Qwest offers no evidence that the regulations at issue are hindering its ability to compete. Rather, despite the costs of

unbundling, competition and consumer interests will continue to benefit from unbundling throughout the four MSAs. Indeed, the evidence is compelling that competitive conditions in these MSAs are such that continued unbundling is required because market forces alone cannot be relied upon to sustain competition. In making its public interest determinations, Section 10(b) requires the Commission to consider whether forbearance will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. The Commission must not only establish that forbearance would not unduly *harm* consumers and competition, it also must find that substantial competitive *benefits* would arise from forbearance. Qwest has failed to establish such benefits would accrue to the public and, accordingly, the Commission should conclude that the Section 10 standard has not been met.

In addressing Qwest's Petitions, the Commenters discuss the Commission's previous decisions on similar forbearance petitions for the Omaha and Anchorage MSAs.[5] The Commenters caution the Commission, however, to bear in mind its statements in the *Omaha Forbearance Order* and the *Anchorage Forbearance Order* that its findings were limited to the specific facts and circumstances in existence in those particular MSAs and that its decisions did not establish "rules of general applicability."[6] In deciding both the Omaha and Anchorage forbearance petitions, the Commission emphasized that it was not "issu[ing] any declaratory rulings, promulgat[ing] any new rules, or otherwise mak[ing] any general determinations"

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5 *See Omaha Forbearance Order*; *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, As Amended, for Forbearance From Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 1958 (2007) ("*Anchorage Forbearance Order*").

6 *Anchorage Forbearance Order*, at ¶ 1.

regarding forbearance.[7] This fact is particularly critical here, given the major differences in the size, scope, and importance of the markets involved in the current proceeding as compared to the Omaha and Anchorage MSAs.[8]

Moreover, the Commenters urge the Commission to take notice of the fact that the predictive judgment it employed in reaching the decision to grant Qwest's forbearance in certain wire centers in the Omaha MSA has proven incorrect. The Commission's assumption that Qwest would offer wholesale access to its dedicated facilities on reasonable terms and conditions once released from the legal mandate of Section 251(c)(3) has proven inaccurate. The Commission should take into account Qwest's aggressive post-forbearance attempts in Omaha to stifle competition that relies on continued use of its last-mile facilities in determining whether forbearance is warranted here.

II. THE STANDARD FOR ANALYSIS OF FORBEARANCE PETITIONS IS WELL ESTABLISHED

Section 10(a) of the Act allows the Commission to forbear from applying any regulation or any provision of the Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, if the Commission determines that:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory;

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7 *Omaha Forbearance Order*, at ¶ 14.

8 The Commenters also note that parts of these comments address the *Anchorage Forbearance Order* notwithstanding the fact that the Commenters have moved the Commission to vacate the *Order* on the ground that no case or controversy continues to exist, rendering the *Order* meaningless and unnecessary. *See* Motion to Vacate, WC Docket No. 05-281 (filed Jul. 5, 2007). The motion remains pending.

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.[9]

The D.C. Circuit and the Commission have made it clear that all three prongs of the forbearance standard must be met for forbearance to be permissible.[10] The three prongs are conjunctive and the Commission must deny any petition which fails to satisfy any single prong.[11] In making its determinations, the Commission must consider "whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services."[12]

Further, the burden of proof in a forbearance proceeding rests squarely on the petitioning party.[13] The petitioning party must "provide evidence demonstrating with specificity why [it] should receive relief under the applicable substantive standards."[14] Anecdotes cannot sustain a petitioning party's burden of demonstrating that the regulations or provisions in question are unnecessary and forbearance is consistent with the public interest.[15] Instead, a petitioning party must provide detailed, market-specific evidence. Moreover, as the Commission

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9 47 U.S.C. § 160(a).

10 *See Petition for Forbearance From E911 Accuracy Standards Imposed on Tier III Carriers for Locating Wireless Subscribers Under Rule Section 20.18(H)*, Order, 18 FCC Rcd 24648, 24653 (2003) ("*E911 Forbearance Order*"); *see also Cellular Telecommunications & Internet Ass'n v. FCC,* 330 F.3d 502, 509 (D.C. Cir. 2003).

11 *E911Forbearance Order*,18 FCC Rcd at 24653.

12 47 U.S.C. § 160(b).

13 *E911 Forbearance Order*, 18 FCC Rcd at 24658.

14 *Id.*

15 *Id.*

emphasized in the *Omaha Forbearance Order*, it is under no statutory obligation to evaluate a forbearance petition "otherwise than as pled."[16] While general unsupported claims are never sufficient to support forbearance, unsubstantiated claims are especially lacking in situations – like the present case – where the Commission has already found (and been upheld by the courts) that telecommunications carriers are impaired without access to the unbundled loops and dedicated transport from which the petitioning party seeks forbearance.

The Commission has stated repeatedly that forbearance determinations do not result in rules of general applicability.[17] Indeed, the Commission has professed its understanding that forbearance proceedings are not the appropriate context in which to craft any new regulatory tests that would apply generally to the industry. In the *Omaha Forbearance Order*, the Commission expressly stated:

> We emphasize, however, that in undertaking this analysis, we do not issue any declaratory rulings, promulgate any new rules, or otherwise make any general determinations of the sort we would properly make in a rulemaking proceeding on a fuller record.[18]

And in the more recent *Anchorage Forbearance Order*, the Commission reiterated that "each case must be judged on its own merits."[19] In deciding whether to grant ACS of Anchorage, Inc. ("ACS") forbearance from Section 251(c)(3) and 252(d)(1) obligations, the Commission explicitly confirmed that it was adopting "no rules of general applicability."[20]

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16 *Omaha Forbearance Order*, at n. 161.

17 *Id. See also Anchorage Forbearance Order*, at ¶ 11 (2007).

18 *Omaha Forbearance Order*, at ¶ 14. *See also Anchorage Forbearance Order*, at ¶ 11.

19 *Anchorage Forbearance Order*, at ¶ 1.

20 *Id.*

Notwithstanding such clear statements, Qwest in effect urges the Commission to grant it forbearance solely because relief similar to the relief requested here was granted in the earlier *Omaha Forbearance Order*. In lieu of detailed data that addresses each of the specific statutory requirements, Qwest's Petitions are filled with mere citations to the *Omaha Forbearance Order*.[21] It is never sufficient for a requesting party to maintain that its request should be granted because of a successful forbearance request made previously for another market.[22] Each forbearance request must be judged on its own merits and must rise or fall based on empirical evidence regarding the particular product and geographic markets for which regulatory relief is being sought.

Presuming the Commission chooses to analyze Qwest's current Petitions for Section 251(c)(3) forbearance under the *Omaha Forbearance Order* framework, such analysis requires (among other things) the petitioning party to show that competitive carriers have constructed competing last-mile facilities and that each of those competitive carriers is willing and able to use their facilities, including their own loop facilities, within a commercially reasonable period of time to provide a full range of services that are substitutes for the incumbent local exchange carrier's ("ILEC's") local service offerings to 75% of the end user locations in each wire center.[23] The Commission has determined that such levels of "coverage" were required to ensure that "significant competition from competitors that do not rely heavily on [the

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21 There are two dozen references to the *Omaha Forbearance Order* in each of the four Qwest Petitions.

22 *See Omaha Forbearance Order*, at ¶ 14; *Anchorage Forbearance Order*, at ¶ n. 28.

23 *Omaha Forbearance Order*, at n. 156, ¶ 69.

ILEC's] wholesale services"[24] is present before forbearance is granted. As stated by the Commission in the *Omaha Forbearance Order*:

> We find that forbearing from section 251(c)(3) and the other market-opening provisions of the Act and our regulations where no competitive carrier has constructed substantial competing "last-mile" facilities is not consistent with the public interest and likely would lead to a substantial reduction in the retail competition that today is benefiting customers in the Omaha MSA. [25]

The facilities coverage requirement likewise was applied in the *Anchorage Forbearance Order*, where the Commission "tailor[ed] ACS's relief to those locations where the record indicates that GCI provides sufficient facilities-based competition to ACS to satisfy the forbearance criteria of section 10(a)."[26] More specifically, ACS was granted forbearance only in "wire center service areas where GCI's voice-enabled cable plant covers at least 75% of the end user locations that are accessible from that wire center."[27]

Qwest's efforts to bootstrap these Petitions to the pre-forbearance situation in the Omaha MSA is particularly egregious given the major differences in the size, scope and importance of the markets involved in the current proceeding as compared to the Omaha MSA. In Omaha, there are only 24 wire centers, and the U.S. Census Bureau ranks the Omaha-Council Bluffs MSA the 60th largest MSA in the country.[28] The entire population of the five counties in

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24 *Id.*, at ¶ 60.

25 *Id.*

26 *Anchorage Forbearance Order*, at ¶ 21.

27 *Id.*

28 *See Omaha Forbearance Petition*, at n. 3; *OMB Bulletin 07-01Update of Statistical Area Definitions and Guidance on their Uses,* U.S. Office of Management and Budget (Dec. 18, 2006) ("*OMB Bulletin*"), *available at* http://www.whitehouse.gov/omb/bulletins/fy2007/b07-01.pdf.

Nebraska and Iowa that comprise the Omaha MSA is approximately 820,000.[29] In contrast, the four MSAs at issue here – Phoenix, Seattle, Minneapolis-St. Paul, and Denver – are some of the largest population centers in the country. They vary in population from 4.04 million (Phoenix) to 2.4 million (Denver) and have a combined population of nearly 13 million.[30] These MSAs, as a group, contain 191 wire centers, eight times the number of wire centers at issue in the *Omaha Forbearance Order*. The implications of the current Petitions are quite dramatic and the Commission therefore must be especially careful to ensure that the statutory requirements for forbearance have been met by Qwest and that a grant of forbearance would serve the public interest.[31]

III. THE PETITIONS SHOULD BE DISMISSED DUE TO THE GROSS INADEQUACIES OF THE SUPPORTING DATA FILED BY QWEST

A. The Evidence Produced by Qwest Does Not Meet Its Burden of Proof

As noted above, the party requesting forbearance has the burden of proof to show that the regulations or provisions in question are unnecessary and forbearance is consistent with the public interest. To meet this burden, the petitioner must produce detailed, market-specific

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29 *OMB Bulletin*.

30 *Id.* These MSAs are the 13th largest (Phoenix-Mesa-Scottsdale), 15th largest (Seattle-Tacoma-Bellevue), 16th largest (Minneapolis-St. Paul-Bloomington), and 21st largest (Denver-Aurora) MSAs in the United States.

31 In establishing the Section 251(c)(3) unbundling rules for loops and transport in the *Triennial Review Order* and the *Triennial Review Remand Order*, the Commission did not contemplate that Section 10 would be used in the sweeping manner Qwest is attempting here. The Commission acknowledged that there may be discrete geographic markets where a Section 251(c)(3) forbearance petition is warranted, but those situations were to be the exception and the loop and transport unbundling rules adopted in the *TRO* and the *TRRO* were intended to apply generally to the ILECs' local exchange operations. Here, Qwest's proposed relief (*i.e.*, the exception) threatens to swallow the rule and render the Commission's unbundling requirements meaningless in a substantial portion of the Qwest incumbent local operating territory. *See Unbundled Access to Network Elements*; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, ¶ 39 (2005) ("*TRRO*"), *affirmed Covad Communications v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

evidence for the particular product and geographic markets for which forbearance is sought. Qwest has failed miserably to meet its burden. The data contained in Qwest's Petitions and accompanying materials suffers from two principal defects in this regard.

First, the data provided by Qwest in support of its Petitions is largely anecdotal. Qwest urges the Commission to grant forbearance on the basis of promotional materials, marketing statements, and broad generalizations concerning the state of competition in the particular MSAs at issue. Reliance on this type of information to justify forbearance, coupled with an ill-founded reliance on Qwest's competitive predictions concerning the future competitive landscape, would result in a disposition of these Petitions that is twice removed from reality.

For example, to support its position that there is sufficient competition by cable providers to justify forbearance in the mass market throughout the Denver, Minneapolis-St. Paul, Phoenix, and Seattle MSAs, Qwest relies predominantly on self-promotional statements, including the statement by Comcast's co-chief financial officer that over the next three years "it is entirely conceivable and even probable that [Comcast] could add 10 million phone customers."[32] Similarly, in support of its position that there is sufficient competition by cable providers in the enterprise market, Qwest cites Cox's claims that it "is in a unique position in the commercial services arena. All of our pieces . . . contribute to the sense of trust that our customers have with us."[33] Statements made by Comcast, Cox, and other cable executives in

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32 *Declaration of Robert H. Brigham and David Teitzel Regarding the Status of Telecommunications Competition in the Seattle, Washington Metropolitan Statistical Area* ("*Brigham/Teitzel Declaration - Seattle*"), at ¶ 18, *quoting* http://marketwatch.com/news/story/comcast-confident-cable-phone-war/story.aspx?guid={F8C09A0C-9A88-4057-AD62-3917AB81D79F}.

33 *See, e.g., Brigham/Teitzel Declaration - Seattle*, at ¶ 17, *quoting* http://www.coxbusiness.com/pressroom/pressreleases/2003-1027.html.

marketing materials,[34] in press releases,[35] and at investor conferences[36] round out the picture Qwest sketches of the state of competition by cable-based providers in the four MSAs at issue. Company press releases, investor relations materials, media reports, and marketing pieces are not the type of evidence upon which the Commission can base its forbearance determinations. Qwest's Petitions are virtually devoid of the hard data regarding the competitive environment that must be provided by any carrier realistically hoping to prevail through the forbearance process. For this reason, Qwest's Petitions should be denied.

The second critical defect in the "proof" submitted by Qwest is that the very limited data regarding the state of competition Qwest has actually produced is not specific enough. This shortcoming renders the data essentially useless to the Commission's forbearance analysis and shows that Qwest has not made the required *prima facie* showing. For example, Qwest has failed to provide evidence of competition at the wire center level, the geographic market used for determining the level of competition in a Section 251(c)(3) forbearance analysis

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34 *See, e.g., Brigham/Teitzel Declaration – Seattle*, at ¶ 18, quoting a Cox mailer advertising its Digital Voice Service. *See also Brigham/Teitzel Declaration – Minneapolis-St. Paul*, at ¶ 17, citing a Comcast direct mail advertising piece.

35 *See, e.g., Brigham/Teitzel Declaration – Seattle*, at ¶ 14, quoting a Cox news release stating that its Digital Telephone service would be deployed across its entire network infrastructure by the end of 2006.

36 *See, e.g., Declaration of Robert H. Brigham and David Teitzel Regarding the Status of Telecommunications Competition in the Minneapolis-St. Paul, Minnesota Metropolitan Statistical Area* ("*Brigham/Teitzel Declaration – Minneapolis-St. Paul*"), at ¶ 16, quoting statements by Comcast Chairman and CEO Brian Roberts in a presentation at a Citigroup Entertainment, Media and Telecommunications Conference. *See also Declaration of Robert H. Brigham and David Teitzel Regarding the Status of Telecommunications Competition in the Denver, Colorado Metropolitan Statistical Area* ("*Brigham/Teitzel Declaration – Denver*"), at ¶ 16, quoting statements by Comcast executives in a presentation at a Citigroup Entertainment, Media and Telecommunications Conference.

in the *Omaha Forbearance Order*.[37] With one exception,[38] the data Qwest has submitted in support of its Petitions is presented on an MSA (or even more aggregated)[39] basis. Given Qwest's prior experience with forbearance petitions of this very nature, Qwest's failure to submit appropriate market-specific data at the outset evidences bad faith and an attempt to "game" the forbearance process.

In the *Triennial Review Remand Order*, the Commission determined that the proper geographic market for analyzing local competition under Section 251(c) was the LEC wire center.[40] The Commission stated:

> We recognize that some imperfections are inherent in any approach we might adopt, and conclude that the other proposed geographic tests have greater defects than the one we select . . . an MSA-wide approach relying on objective, readily-available data would alleviate dramatically any concerns regarding administrability, but (as we also describe below) would require an inappropriate level of abstraction, lumping together areas in which the prospects for competitive entry are widely disparate.[41]

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37 *See Omaha Forbearance Order*, at ¶¶ 61-62; *Anchorage Forbearance Order*, at ¶ 14 ("As in the *Qwest Omaha Order*, we conclude that it is appropriate for us to use the wire center service area as the relevant geographic market.").

38 **[BEGIN REDACTION]**

[END REDACTION]

39 Some of the data proffered by Qwest is nationwide in scope. *See, e.g., Brigham/Teitzel Declaration – Denver*, at ¶ 16 ("In September 2006, Comcast reported that it was expecting to add 1.3 million to 1.4 million digital phone customers nationally for the year versus 1 million additions it had previously estimated."). *See also* Qwest Petition – Seattle, at 7 ("At a national level, Comcast expects its telephone subscriber base to grow by nearly 400% between 2007 and 2010.").

40 *See Triennial Review Remand Order*, at ¶ 155-56.

41 *Triennial Review Remand Order*, at ¶ 155.

Consistent with this standard, in the *Omaha Forbearance Order*, the Commission based its Section 251(c)(3) forbearance analysis in part on competitive coverage at the wire center level.[42] This approach was followed in the Anchorage forbearance proceeding. There, the Commission granted ACS forbearance from Section 251(c)(3) unbundling obligations in five of the 11 wire centers in the Anchorage study area, finding that the level of facilities-based competition in those specific locations will ensure that market forces will protect the interests of consumers.[43]

The *Triennial Review Order* and the Commission's decisions in the Omaha and Anchorage forbearance dockets make it clear that wire center-specific evidence is essential to the Commission's Section 251(c)(3) forbearance analysis. Qwest has not justified a departure from this approach and, at the same time, it has not provided any factual evidence regarding the state of facilities-based local competition on a wire center-specific basis in the relevant MSAs. In the absence of this data, the Commission's only reasonable course of action is to dismiss Qwest's Petitions on the ground that Qwest has failed to sustain its burden of proof.

Qwest's "proof" is lacking in numerous additional important respects discussed more fully herein, including: (1) the failure to specify the extent to which the purported competition upon which Qwest relies is facilities-based (*i.e.*, does not rely on use of Qwest last-mile connections or interoffice transport); (2) the failure to specify the extent to which alternative fiber networks reach individual customer locations; and (3) the lack of information regarding the extent to which purported switched access line losses by Qwest were offset by increases in other Qwest-provided services.

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42 *Omaha Forbearance Order*, at n. 186.

43 *Anchorage Forbearance Order*, at ¶¶ 14, 16.

Importantly, Qwest should not be permitted to use the *ex parte* process to game this proceeding. Qwest's petitions should be evaluated and judged by the Commission as they were presented by Qwest at the time of filing.[44] After all, Qwest in its sole discretion determined the timing of its filings and the nature and extent of supporting data to include with its Petitions. If Qwest is permitted to offer additional empirical data through the *ex parte* process, parties with a critical interest in the outcome of this proceeding, and the Commission itself, will be forced to evaluate and respond to a moving target, and likely will not have a full and fair opportunity to address the new information.[45] As stated in the *Omaha Forbearance Order*, the Commission is under no obligation to evaluate a forbearance petition "otherwise than as pled."[46] Accordingly, the Commission should consider Qwest's Petitions as filed and, after doing so, dismiss them for failure to sustain their burden of proof.

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44 Qwest may be attempting to follow the example set by Verizon in its pending Section 251(c)(3) forbearance proceeding. Verizon withheld market-specific data to support its forbearance requests for six MSAs until the final day of the formal pleading cycle on its petitions. Various interested parties have moved the Commission to dismiss or, in the alternative, deny Verizon's petitions on the basis of this late-filed data. That motion is pending. *See* Motion to Dismiss or, in the Alternative, Deny Petitions for Forbearance on the Basis of Late-Filed Data, WC Docket No. 06-172 (filed May 22, 2007).

45 Allowing Qwest to submit more granular empirical evidence at this point in time (or in the future) would be highly prejudicial. Four months, representing one-third of the statutory period provided for evaluation of the forbearance requests, have passed since the Petitions were filed. Rather than allow Qwest to submit more granular information at this point – should Qwest seek to avoid dismissal through such a ploy – the Commission should dismiss the Petitions and allow Qwest to refile with more granular data, starting the 12-month statutory clock anew. In addition, the Commission should avoid a repetition of the highly-dubious 11th hour quest for additional decisional information undertaken recently by the Chief of the Wireline Competition Bureau with respect to a group of pending broadband forbearance petitions. *See* Letter from Thomas J. Navin, Chief, Wireline Competition Bureau, Federal Communications Commission to Susanne A. Guyer, Verizon, Melissa Newman, Qwest, Robert W. Quinn, Jr., AT&T, Jeffrey S. Lanning, Embarq, and Gregg C. Sayre, Frontier Communications, WC Docket Nos. 04-440, 06-125, 06-147 (Aug. 23, 2007). Such an effort disregards the rights of interested parties to review and comment on such evidence.

46 *Omaha Forbearance Order*, at n. 161.

IV. THE PETITIONS SHOULD BE DENIED ON THE MERITS BECAUSE QWEST HAS NOT MET ITS BURDEN OF PROOF THAT SUFFICIENT FACILITIES-BASED COMPETITION EXISTS WITHIN EACH RELEVANT MARKET

In the event that the Commission does not dismiss Qwest's Petitions, the Commission should deny Qwest forbearance from Section 251(c)(3)'s unbundling requirements. The burden of proof to justify forbearance falls squarely upon Qwest as the petitioning party,[47] and to meet the first two prongs of Section 10(a), Qwest must prove that enforcement of Section 251(c)(3) is not necessary to ensure that its charges and practices are just and reasonable and not unreasonably discriminatory, and that enforcement of Section 251(c)(3) is not necessary for the protection of consumers.[48] Qwest, for all practical purposes, has made no demonstration that sufficient facilities-based competition exists in the relevant markets to ensure that its rates and charges are just and reasonable and not unreasonably discriminatory and that enforcement of Section 251(c)(3) and the other provisions it requests forbearance from are not necessary for the protection of consumers, as required by Section 10(a).[49]

Critically, Qwest has failed to present its analysis in terms of the relevant geographic and product markets. It is *not* the burden of either the Commission or other interested parties to extrapolate this data, sort these issues out and, after identifying the relevant markets, to apply the hodgepodge of anecdotes and general information Qwest provided with its Petitions in an attempt to conduct the careful analysis Qwest chose not to undertake. And it is

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47 *See* Section II, *supra*.

48 47 U.S.C. § 160(a).

49 The Washington Utilities and Transportation Commission ("UTC") agrees with this conclusion. In its comments in response to Qwest's Petition for forbearance in the Seattle MSA, the UTC "recommends that the Commission deny the Seattle Petition because the scope of the relief Qwest requests would substantially impede or entirely eliminate intra-modal competition in the Seattle MSA." Comments of the Washington Utilities and Transportation Commission, WC Docket No. 07-97 (filed Aug. 29, 2007) ("*UTC Comments*"), at 1.

certainly not appropriate as a legal matter for the Commission to accept on blind faith Qwest's broad contentions regarding the level of competition in the MSAs at issue. Qwest has the burden of demonstrating that sufficient facilities-based competition *for each relevant product market* exists *in each relevant geographic market* before forbearance can be approved for network elements used to serve *that product market in that geographic market*. Even in Omaha, where the potential stakes were much smaller, the Commission made clear that there is no short-cut available to Qwest (or the Commission) when considering an issue of such wide-ranging importance.

A. Qwest's Analysis Inappropriately Ignores Relevant Geographic Markets

In each of its Petitions, Qwest treats the entire MSA as the relevant geographic market.[50] By this, Qwest appears to be suggesting that competition is ubiquitously sufficient throughout each MSA to justify forbearance and that no more-granular analysis is required. The *Omaha Forbearance Order* and the *Anchorage Forbearance Order* make it impossible to accept this contention without substantial proof. Indeed, as the petitioner in the Omaha forbearance proceeding, Qwest is no doubt aware of the Commission's use of wire centers in its analysis, yet it has made no effort to justify its failure to provide such information here. Qwest nowhere addresses why it believes the MSA is the appropriate geographic market. The only way Qwest could hope to substantiate its claims for forbearance, therefore, is to conduct the very analysis which it steadfastly avoids.

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50 *See* Qwest Petition – Denver, at 1 ("Qwest Corporation ('Qwest') seeks forbearance from significant, burdensome regulation, particularly loop and transport unbundling and dominant carrier regulation throughout the Denver Metropolitan Statistical Area ("MSA") . . . .). *See also* Qwest Petition – Minneapolis-St. Paul, at 1; Qwest Petition – Phoenix, at 1; Qwest Petition – Seattle, at 1. Importantly, as discussed below, Qwest often blurs the distinction between the mass market and the enterprise market in order to support its argument that forbearance is appropriate in both markets.

Qwest attempts to demonstrate that it merits forbearance by providing a litany of anecdotes regarding actual or would-be competitors that are or soon might be providing competitive services in some piece-parts of the MSAs at issue.[51] Qwest offers an unconvincing hodgepodge of MSA-wide, state-wide, and even national information to support its Petitions, but such information is worthless to complete the sort of market-specific analysis required by Section 10. Central to its efforts, Qwest recites the names of many cable-based, wireless, Voice over Internet Protocol ("VoIP"), and CLEC providers purportedly offering competing services.[52] But upon examination, Qwest fails to meet its burden of proof because the information it provides does not further a meaningful market-specific analysis.

1. **Qwest has provided no empirical evidence regarding the existence of facilities-based competition.**

Qwest has utterly failed to show that the various competitive providers it lists represent a sufficient measure of facilities-based competition for the purpose of the Commission's forbearance analysis. It is unclear the extent to which any of these entities actually compete with Qwest in the relevant geographic markets *today* because Qwest has not attempted to make such a showing. Further, to the extent there is some actual competition, Qwest is silent regarding the extent to which these entities are providing service using their own

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51 *See, e.g.,* Qwest Petition – Denver, at 8 ("In sum, Comcast has extensive facilities in the Denver MSA capable of delivering mass market services."). *See also* Qwest Petition – Seattle, at 23 ("[t]here were approximately *** *** business lines associated with facilities-based CLECs in the rate centers in the Seattle MSA.").

52 *See, e.g.,* Qwest Petition – Seattle, at 16 ("Currently, there are at least 60 VoIP providers (excluding Qwest) serving the Seattle MSA including Vonage, Packet8, Skype, SunRocket and others."). *See also*, Qwest Petition – Denver, at 10 ("[V]arious major carriers such as Sprint PCS, T-Mobile, Verizon, Cricket and AT&T (formerly known as Cingular) all offer telephone services in the Denver MSA . . ."); Qwest Petition – Phoenix, at 11, 15; Qwest Petition – Minneapolis-St. Paul, at 11-12, 16.

facilities without dependence upon the very UNEs for which it seeks forbearance.[53] In the *Omaha Forbearance Order*, the Commission found it crucial that the primary competitor to Qwest was "successfully providing local exchange and exchange access services *without relying on Qwest's loops and transport.*"[54] The Commission stated emphatically that:

> Forbearing from section 251(c)(3) and the other market-opening provisions of the Act and our regulations where no competitive carrier has constructed substantial competing "last mile" facilities is not consistent with the public interest and likely would lead to a substantial reduction in the retail competition that is today benefiting customers in the Omaha MSA.[55]

Similarly, in the *Anchorage Forbearance Order*, the Commission found the extent to which ACS's competitor, GCI, has constructed last-mile facilities to be highly relevant to its forbearance analysis and limited its grant of forbearance to "those locations where the record indicates that GCI provides sufficient facilities-based competition to ACS to satisfy the forbearance criteria of section 10(a)."[56] The Commission in the *Anchorage Forbearance Order* reiterated:

> Forbearing from section 251(c)(3) or section 252(d)(1) of the Act where no competitive carrier has constructed substantial competing last-mile facilities capable of providing telecommunications services is not consistent with the public interest and likely would lead to a substantial reduction in the retail competition that today is benefiting customers in the Anchorage study area.[57]

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53 *See* n. 38, *supra*, discussing the shortcomings of Qwest's Highly Confidential Exhibit 2.

54 *Omaha Forbearance Order,* at ¶ 64 (emphasis supplied).

55 *Omaha Forbearance Order,* at ¶ 60.

56 *Anchorage Forbearance Order*, at ¶ 21.

57 *Id.*, at ¶ 23.

Yet in its Petitions, Qwest provides no empirical evidence regarding the existence of facilities-based (*i.e.*, non-UNE or Qwest wholesale services-based) competition in each wire center in the four MSAs at issue. This absence of this data cannot be overlooked and demonstrates Qwest's failure to meet it burden of proof.[58]

2. The potential for competition does not justify the grant of forbearance.

The Commission has made clear in previous forbearance cases that the mere *potential* for competition does not justify the grant of forbearance. While the potential for competition may be a factor, a threshold of *actual* facilities-based competition is required.[59] In the *Omaha Forbearance Order*, the Commission concluded that although facilities coverage[60] is important to a Section 251(c)(3) forbearance determination, a retail market share requirement also must be met before forbearance in any wire center is appropriate.[61] The Commission expressed this point clearly when it stated:[62]

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58 In its comments, the UTC points to the existence of a number of wireline competitors in the Seattle MSA that "rely heavily, and in some cases solely, on the availability of loop and transport UNEs from Qwest to compete, particularly for enterprise customers" and notes that Qwest's "petition is relatively silent with respect to competitors' reliance on UNEs" in Seattle. *UTC Comments,* at 5, 8.

59 *Omaha Forbearance Order,* at ¶ 62.

60 Facilities coverage, as employed in the *Omaha Forbearance Order,* refers to whether a competing carrier "is willing and able within a commercially reasonable time" to provide a full range of services that are substitutes for the ILEC's local exchange services in each relevant product market to customers served by a specific wire center within the footprint of the ILEC. *Id.*, at ¶¶ 62, 69 (granting Qwest forbearance in the mass market in those Omaha wire centers where Cox's voice-enabled cable plant covers at least 75% percent of the end user locations in that wire center).

61 The retail market share requirement employed in the *Omaha Forbearance Order* refers to the number of local end users *actually* served by a competing facilities-based carrier, or the percentage of the retail local exchange market *captured* by a competing facilities-based carrier in each relevant product and geographic market. *Id.,* at ¶ 66 (examining the number of voice customers Cox has obtained). *See also id.,* at ¶ 67 (discussing the role of the wholesale market).

62 *Id.,* at ¶¶ 61-62.

> While Qwest seeks relief from the obligations of section 251(c)(3) in its entire service area within the MSA, . . . the criteria for section 10(a) are not satisfied in all of Qwest's territory in this MSA. The merits of the Petition warrant forbearance only in locations where Qwest faces sufficient facilities-based competition to ensure that the interests of consumers and the goals of the Act are protected . . .
>
> * * *
>
> We tailor Qwest's relief to specific thresholds of facilities-based competition from Cox.

Evidence of *actual* facilities-based competition is especially critical in light of recent post-forbearance experience in the Omaha MSA. In the *Omaha Forbearance Order*, the Commission found that "the actual and potential competition from established competitors which can rely on the wholesale access rights and other rights they have under section 251 and 271 from which we do not forbear, minimizes the risk of duopoly and or coordinated behavior or other anticompetitive conduct" in the Omaha MSA.[63] The Commission predicted that in the absence of a Section 251(c)(3) unbundling obligation, Qwest would have the incentive to make attractive wholesale offerings available to competitors that do not have their own last-mile facilities, thereby avoiding a Qwest/Cox duopoly.[64]

Unfortunately, the Commission's predictive judgment in the *Omaha Forbearance Order* turned out to be incorrect. McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"), a competitor in the Omaha MSA dependent on access to Qwest's last-mile facilities, recently filed a petition for modification of the *Omaha Forbearance Order*, requesting that the Commission reinstate Qwest's Section 251(c)(3) loop and transport unbundling obligations in the Omaha MSA because the Commission's "'predictive judgment' that Qwest

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63 *Id.*, at ¶ 71.

64 *Id.*, at ¶ 67.

would offer wholesale access to dedicated facilities on reasonable terms and conditions once released from the legal mandate of Section 251(c)(3) has proven incorrect."[65] McLeodUSA detailed it has made repeated good faith attempts to negotiate replacement wholesale arrangements with Qwest and that "Qwest has conclusively refused to negotiate wholesale pricing for voice-grade, DS1, and DS3 loops and transport for the nine affected wire centers."[66] McLeodUSA stated that if the Commission fails to reinstate Qwest's Section 251(c)(3) unbundling obligations, it will be forced to exit the Omaha MSA.[67]

There are several important lessons to be learned from what has occurred in the Omaha MSA since Qwest gained Section 251(c)(3) forbearance. First, it is clear that the Commission cannot rely here on the same predictive judgment it exercised in Omaha regarding Qwest's future behavior and how that conduct would impact competition if forbearance is granted. Qwest's conduct in the Omaha MSA proved the Commission's predictive judgment to be incorrect. Second, in determining whether the actual competition that currently exists will survive a grant of forbearance, the Commission must take note of Qwest's aggressive post-

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65 *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No. 04-223 (filed Jul. 23, 2007), ("*McLeodUSA Petition*"), at 1.

66 *Id.*, at 4.

67 *Id.*, at 14. McLeodUSA is not the only competitor that has concluded the forbearance granted Qwest in the *Omaha Forbearance Order* forecloses it from competing in the Omaha MSA. Integra Telecom, Inc. recently explained that it has abandoned plans to enter the Omaha market as a result of the *Omaha Forbearance Order*. *See Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, Comments of Integra Telecom, Inc., WC Docket No. 06-172 (filed Mar. 5, 2007), at 4.

forbearance attempts in Omaha to stifle competition that relies on continued use of its last-mile facilities.[68]

Further, Commission precedent requires that Qwest provide evidence of actual facilities-based competition in wholesale as well as retail markets. Since Qwest seeks forbearance from the Section 251(c)(3) unbundling obligation for wholesale services, the Commission's analysis must consider the effects that a grant of forbearance would have on consumers of wholesale services as well as consumers of retail services. And, as the Commission correctly noted in the *Anchorage Forbearance Order*, "[c]ompetition in the retail market can be directly affected by the level of competition and the availability of inputs in an upstream wholesale market (*e.g.*, DS0 and high-capacity loops)."[69] Qwest has not attempted to make such a showing.[70]

3. **Qwest's line loss data does not support its request for forbearance from Section 251(c)(3) unbundling requirements.**

Data showing declines in Qwest's residential switched access lines and business lines provide no evidence of the actual facilities-based competition that is a prerequisite to Section 251(c)(3) forbearance. In support of its Petitions, Qwest cites decreases (between 2000 and 2006) in its retail residential switched access lines and its business lines, contending that these line losses show that "various competitive alternatives are widely used in the [ ] MSA."[71]

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68 Of course, as discussed in Section IV.A, *supra*, Section 10, and the Commission's prior Section 251(c)(3) forbearance decisions, require the Commission to ignore UNE-based competition in determining whether sufficient actual competition exists in a particular product and geographic market to warrant a grant of forbearance from loop and transport UNE unbundling requirements.

69 *Anchorage Forbearance Order*, n. 82.

70 *See* Section IV.B.5, *infra.*

71 Qwest Petition – Denver, at 2; Qwest Petition – Minneapolis-St. Paul, at 2; Qwest Petition – Phoenix, at 2; Qwest Petition – Seattle, at 2.

In reality, these figures show nothing regarding the state of facilities-based competition in these MSAs. The Commission recognized this in the *Anchorage Forbearance Order* where it "reject[ed] ACS's contention that the sheer fact of its line loss compels forbearance."[72] As the Commission correctly noted in the *Anchorage Forbearance Order*, line loss by an ILEC "does not necessarily indicate capture of that customer by a competitor, but may indicate that the consumer converted a second line used for dial-up Internet access to an incumbent LEC broadband line for Internet access."[73] It also may indicate that the consumer has abandoned its wireline voice service in favor of a non facilities-based offering. Before Qwest can argue that line loss data should be included in the Commission's forbearance analysis, it must show that decreases in its line counts are not attributable to consumers moving from one Qwest product to another Qwest service offering.[74] Qwest has offered no such evidence here.

B. Qwest Fails to Show Sufficient Facilities-Based Competition Exists In the Four MSAs at Issue

As further shown below, Qwest has failed to provide sufficient evidence of the actual wholesale or retail facilities-based competition that is the absolute prerequisite to a finding that the consumer protection requirements of Section 10(a) have been met and the grant of forbearance for any wire center in any of the four MSAs identified in its Petitions is justified.

1. Cable Competition

A principal foundational basis in each of Qwest's Petitions is the presence of cable competitors in the relevant MSA. Although various cable companies may have upgraded

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72 *Anchorage Forbearance Order*, n. 88.

73 *Id.*

74 *See, e.g., Qwest Reports Steady Second Quarter 2007 Results – Continued Improvement in Revenue, Cash Flow and Margin Trends* (Aug. 1, 2007), *available at* http://www.qwest.com/about/media/pressroom/1,1281,2160_archive,00.html (reporting "solid subscriber growth" by Qwest in consumer broadband and video markets).

their cable plant to provide cable-based telephony and thus may provide some measure of facilities-based competition in each MSA, the Qwest Petitions simply fail to provide the granular data necessary for analysis of the presence of facilities-based competition in each product market. Instead, Qwest relies upon insufficient and overly-broad representations (and estimates) of competition by cable providers generally, making it largely impossible to ascertain the extent of actual facilities-based competition in any of the myriad wire centers in the four markets at issue.[75]

a. Mass Market

Nowhere does Qwest identify the degree of facilities-based competition in the mass market from cable in any particular wire center. Instead, Qwest focuses simplistically on the geographic area served by cable competitors generally, presenting that information as a percentage of the total number of Qwest wire centers in the MSA. This is a far cry from demonstrating the retail market share (or, at a minimum, coverage potential) of any cable competitor *within* these wire centers. For example, in Denver, Qwest notes that "as of December 2006, Comcast was serving a geographic area encompassing Qwest wire centers that account for approximately *** *** of the Qwest retail residential lines in that MSA."[76] Qwest says nothing regarding the actual telephony share – if any – of Comcast in the residential market within any of

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75 *See, e.g.,* Qwest Petition – Denver, at 8 ("In sum, Comcast has extensive facilities in the Denver MSA capable of delivering mass market services."); Qwest Petition – Minneapolis, at 7 ("[W]ith 1.2 million homes passed by Comcast in the Minneapolis-St. Paul MSA, if Comcast achieves its goal of a 20% CDV penetration by 2009, this would equate to over 200,000 Comcast Digital Voice ('CDV') customers."); Qwest Petition – Phoenix, at 7 ("Cox is the U.S. cable industry's biggest overall provider of cable telephony, with 1.8 million circuit-switched and VoIP subscribers . . .It is aggressively expanding its base of telephone subscribers system-wide, and especially in the Phoenix MSA."); Qwest Petition- Seattle, at 9 ("Comcast and Millennium have extensive facilities in the Seattle MSA capable of delivering mass market services.").

76 Qwest Petition – Denver, at 7.

the Qwest wire centers in the Denver MSA.[77] The most specific data presented by Qwest is a "reasonable estimate[ ] of Comcast's voice customer base rang[ing] from 103,000 (which is based upon Comcast's system-wide voice penetration rate) . . . to 380,000 (which is based upon Comcast's publicly-stated goal for its penetration rate in Spokane, Washington).[78] Clearly, generalized information of this nature is useless in determining whether Qwest has satisfied the prerequisites for Section 251(c)(3) forbearance in the four MSAs at issue.

Qwest also fails to demonstrate where, and the extent to which, the cable companies offer voice service to residential customers using their own upgraded facilities. As explained above, it is the degree of *facilities-based* competition that is of prime importance in a forbearance analysis. Without such data, the presence of secondary factors, such as competitors that rely on Qwest's wholesale alternatives to provide retail services in competition with Qwest, must be presumed. Such secondary factors result in significantly weaker competitive environments which cannot justify forbearance. Before the Commission can rely upon Qwest's claims regarding cable competition for mass market telephony services, therefore, Qwest must adequately demonstrate that each cable provider upon which Qwest relies (1) does not rely materially on Section 251(c)(3) UNEs or other Qwest wholesale facilities;[79] (2) is willing and able to use its facilities, including its own loop facilities, within a commercially reasonable period of time to provide a full range of services that are substitutes for Qwest's local service

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77 Similar representations were made by Qwest in support of forbearance in the Minneapolis-St. Paul, Phoenix, and Seattle MSAs. *See* Qwest Petition – Minneapolis-St. Paul, at 7; Qwest Petition, Phoenix, at 7; Qwest Petition – Seattle, at 7.

78 Qwest Petition – Seattle, at 7.

79 *See Omaha Forbearance Order*, at ¶ 64. Qwest ignores the issue of whether the cable providers at issue are ubiquitously present within their franchise areas. Nor does Qwest demonstrate that the cable providers' franchise areas subsume or, at a minimum, reach a certain percentage of subscribers within each wire center.

offerings to 75% of the end user locations accessible from each wire center;[80] and (3) has achieved a significant level of market penetration.[81] Qwest has come woefully short of meeting these requirements.

Tellingly, Qwest reaches even beyond MSA-wide data in an effort to provide support for its requests. In an attempt to demonstrate how cable operators are growing in the relevant MSAs, Qwest offers *nationwide* projections of growth.[82] These projections prove nothing about the geographic coverage of cable telephony facilities or the potential for subscriber or market share increases for telephony within the specific MSAs at issue, let alone in the wire centers within those MSAs. The Commission should completely disregard such data.

At bottom, Qwest offers no data regarding cable provider penetration for facilities-based telephony services in the mass market on a wire-center-by-wire-center basis. Yet Qwest brazenly quotes the *Omaha Forbearance Order* as support for its contention that the data it has provided "is, standing alone, 'sufficient to justify forbearance' from loop and transport unbundling regulations, and from dominant carrier regulation of switched access service."[83] Based on the record Qwest has assembled, its attempt to rely on the Commission's language regarding cable-based telephony competition must fall on deaf ears. Given the primary role assigned to cable-based competition in Qwest's Petitions with reference to the mass market, the

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80 *See Omaha Forbearance Order*, at n. 156, ¶ 69.

81 *See Omaha Forbearance Order*, at ¶ 66; *Anchorage Forbearance Order*, at ¶ 28.

82 *See, e.g.,* Qwest Petition – Minneapolis-St. Paul, at 7 ("At a national level, Comcast expects its telephone subscriber base to grow by over 200% between 2007 and 2009 (from 2.5 million to 8 million)."). *See also* Qwest Petition – Denver, at 7; Qwest Petition – Phoenix , at 7-8; Qwest Petition, Seattle, at 7. Significantly, the cable providers whose national growth rates are cited by Qwest provide service in wide geographic areas well beyond the boundaries of the MSAs for which Qwest seeks forbearance.

83 Qwest Petition – Seattle, at 9, quoting *Omaha Forbearance Order*, at ¶ 69 (footnotes and citations omitted).

Commission should conclude on this basis alone that the Section 10(a) standard has not been met and that forbearance is not warranted.

b. Enterprise Market

Qwest similarly fails to meet its burden of proof regarding cable-based telephony competition in the enterprise market. Unlike the mass market, the medium-sized and large businesses that comprise the enterprise market generally require more sophisticated services than traditional voice-grade DS0s, such as DS1 services, fractional DS1s, and other high capacity services. Qwest fails to demonstrate that cable competitors are able – or will be able within a commercially reasonably period of time – to adequately serve such customers with their current cable plant. Qwest also ignores problems inherent to cable-based provision of services to the enterprise market due to a lack of physical proximity, technical inability, or both.[84] To the extent cable companies have deployed some amount of fiber or other infrastructure within the relevant MSAs that can support high-capacity telephony services, they can only serve businesses within close proximity to such infrastructure, an operational reality which cautions against broad conclusions regarding the availability of competitive enterprise services without engaging in a more detailed analysis as required by the Commission. As succinctly stated by the New York State Department of Public Service Staff:[85]

> [C]able-based telephony is of little assistance to the enterprise market at this point in time since most small and medium-sized businesses are not 'cabled-up' (i.e. current cable-based services are television rather than voice driven)

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84 Based on industry norms, enterprise customers for standard "off-the-shelf" services expect to receive service within 30 calendar days. The time frame for mass market customers is between 10-14 calendar days.

85 *See Department of Public Service Staff White Paper*, Case Nos. 05-C-0237, 05-C-0242, New York State Public Service Commission, (Jul. 6, 2005) ("*NYS Staff White Paper*"), at 31.

> and larger businesses generally have T-carrier systems for their telecommunications needs . . .

Qwest offers no evidence that cable companies are providing extensive facilities-based telephony services to enterprise customers today. Instead, Qwest focuses solely on the presence of the franchised cable networks in each MSA as evidence that the cable companies possess "the necessary facilities to provide enterprise services."[86] According to Qwest, because cable companies in the four MSAs at issue have "had strong success in the mass market" and possess "a nearly ubiquitous network,"[87] they pose a "substantial competitive threat" that should be considered relevant to the Commission's determination of whether forbearance is warranted in the enterprise market.[88]

All indications are that cable providers *operating their cable-technology facilities* still do not occupy a meaningful position in the business marketplace, at least one sufficient at this time to support forbearance from Section 251(c)(3) unbundling obligations. In the *Triennial Review Remand Order*, the Commission found that cable transmission facilities are not used to serve business customers to any significant degree.[89] More recently, in support of their merger application, AT&T and BellSouth claimed that competition from cable operators for small and medium-sized businesses may only become prevalent toward the end of this decade.[90] In November 2006, when reporting on the state of the cable industry, UBS focused solely on results

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86 *See* Qwest Petition – Denver, at 22; Qwest Petition – Minneapolis-St. Paul, at 23; Qwest Petition – Phoenix, at 21-22; Qwest Petition – Seattle, at 22.

87 Qwest Petition – Denver, at 22.

88 *Id.*, at 21.

89 *Triennial Review Remand Order*, ¶ 193.

90 *Application Pursuant to Section 214 of the Communications Act of 1934 and Section 63.04 of the Commission's Rules for Consent to the Transfer of Control of BellSouth Corporation to AT&T, Inc.*, WC Docket No, 06-74, at 81.

among residential consumers (*i.e.*, households), declining to mention any business services.[91] It may be that some cable providers recently have announced plans to expand their focus on business services or have begun to make modest inroads with very small businesses, but it is difficult (and highly speculative) to anticipate the degree to which they will be successful in the near-term, despite their boasts regarding availability and speed of delivery. Thus, suggestions by Qwest in its Petitions that cable operators provide a significant competitive threat in the enterprise market remains more fantasy than reality.

To the extent that cable companies intend to rely on their traditional cable systems rather than other modes of delivery to provide telephony to enterprise customers, cable system technology still faces serious technical and operational hurdles before it can be used to provide enterprise level services in any competitively meaningful fashion. Simply because a cable system passes near a business location does not mean that the cable operator can serve that business customer within a commercially reasonable period of time, if at all. Existing cable technology does not yet support the provision of reliable, economic, or large scale services at a DS1 level to enterprise customers, primarily because of timing/clocking and upstream bandwidth problems.[92] While CableLabs, the recognized standards body for the cable industry, issued specifications in May 2006 to address the timing/clocking problems in part, full commercial deployment is expected no sooner than mid-2008.[93] In order to provide enterprise-level telephony services, even if the timing/clocking problems are solved, cable systems must make

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91 UBS Investment Research, Wireline Postgame Analysis 14.0, Recap of Third Quarter 2006 Results, 22 November 2006, at 6, 35.

92 *See, e.g.,* Letter from John Nakahata, Counsel for General Communication Inc. ("GCI"), to Marlene Dortch, Secretary, FCC, WC Docket No. 05-281 (Nov. 14, 2006), at 9 ("*GCI Nov. 14 Ex Parte*"); Comments of GCI on ACS of Anchorage, Inc. Forbearance Petition, WC Docket No. 05-281, (Aug. 11, 2006), at 14-15, 17.

93 *Id.*

significant upgrades to their network capacity at considerable expense. Otherwise, cable systems will remain seriously constrained in the amount of enterprise-level services they can accommodate.[94]

There is no evidence offered in the Petitions which shows that cable systems are currently offering significant levels of facilities-based telephony services to enterprise customers in any of the relevant MSAs, let alone the wire centers comprising those MSAs. Indeed, Credit Suisse recently noted that the country's largest cable operator, Comcast (a relevant cable operator in the Denver, Minneapolis-St. Paul, and Seattle MSAs), "is still in the early stages of starting up its commercial telecom business. . . . It's going to take some time to develop business plans, establish operations (e.g., product development, customer support, field operations, and sales), and to then ramp up the business throughout Comcast's footprint."[95] Moreover, while cable operators are reportedly venturing into the business arena, they are typically targeting smaller businesses, not large enterprises.[96] As reported last October, "[c]able operators generally avoid the large business, or 'enterprise,' market. Those customers, from regional banks to giant corporations – have complicated demands and locations in multiple cities."[97] And Comcast itself recently projected that cable-supported business services will be a new growth engine for cable operators, but "in 5-plus years."[98]

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94 The Commission acknowledged these issues in the *Anchorage Forbearance Order,* where it referenced GCI's statements that "it will need to undertake a 'large-scale upgrade of its network capacity before it can provide all business customers with DS1 services over its [cable] plant.'" *Anchorage Forbearance Order*, at n. 137.

95 Credit Suisse, *More Upside in Comcast: Comcast Report,* 8 (Sept. 22, 2006).

96 *See* Peter Grant, "Cable Operators Woo Small-Business Subscribers in Battle For Telecom Turf," Wall Street Journal, Jan. 17, 2007, at A1, A17.

97 John M. Higgins, *Cable's Next Big Thing,* Broadcasting & Cable, Oct. 9, 2006, at 18.

98 *Comcast May Eventually Provide Phone, Broadband, and Video Services Wirelessly,* Communications Daily, Sept. 21, 2006, at 11.

In short, the provision of competitive facilities-based telephony to enterprise customers using cable technology is several years in the future, at the least. Such competition is not present today, and every indication is that it will not be available in a reasonable timeframe. This is especially true for large business customers.[99] Accordingly, there is not sufficient competition from cable companies in the enterprise market to support forbearance relief in any of the four MSAs that are the subject of Qwest's Petitions.

2. **Competition from Mobile Wireless Services**

Like competition from cable-based services, any competition Qwest currently experiences from wireless services does not support the forbearance Qwest requests. Indeed, wireless services are not relevant to the present forbearance analysis because, as the Commission recognized in the *Omaha Forbearance Order,* wireless penetration data generally is not available to support a granular forbearance analysis. In the *Omaha Forbearance Order*, the Commission found that:

> Qwest has not submitted sufficient data concerning the full substitutability of interconnected VoIP and wireless services in its service territory in the Omaha MSA, and *because the data submitted do not allow us to further refine our wire center analysis, we do not rely here on intermodal competition from wireless* and interconnected VoIP services to rationalize forbearance from unbundling obligations.[100]

The Commission made a similar finding in the *Anchorage Forbearance Order*, noting the lack of sufficient data to evaluate the extent of substitution of wireless services in the Anchorage study

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99 Comcast, for example, sees its growth in business focused primarily in the small and medium-sized business sector, which it views as a separate market. *See* UBS Investment Research, Comcast Corporation Site Visit, 20 November 2006, at p. 10.

100 *Omaha Forbearance Order*, at ¶ 72 (emphasis supplied).

area.[101] The conclusion reached by the Commission in the Omaha and Anchorage forbearance proceedings is equally applicable here, since Qwest has failed to offer any data differing from (or more substantial than) the data provided by the petitioning party in the Omaha or Anchorage dockets.

To the extent wireless competition is considered by the Commission in its forbearance analysis (which it should not be), wireless competition does not come anywhere close to tipping the scales in favor of forbearance. At the outset, Qwest's Petitions offer no evidence, and indeed no discussion whatsoever, regarding mobile wireless service as a competitor in the enterprise market. Qwest therefore has absolutely failed to meet its burden of proof in this regard, and further discussion regarding wireless competition in the enterprise market is not necessary.[102]

Qwest does not fare much better when considering wireless competition in the mass market. As an initial matter, wireless service, standing alone, cannot currently be considered a true substitute for wireline service in the mass market. Qwest's overreaching suggestion to the contrary is predicated on a faulty telephony-centric assumption.[103] Today, wireline service gives consumers not only access to other end users for "telephone" calling but also provides access to the Internet, whether through a broadband or dial-up connection. While there are fledgling data services currently available over mobile phones, wireless access today is

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101 *Anchorage Forbearance Order*, at ¶ 29.

102 In its comments, the UTC points out that evidence regarding inter-modal competition "from cable TV, wireless carriers, and VOIP providers in the residential telephone market" is not "sufficient to remove regulations designed to promote competition for enterprise customers. Broadly construed data regarding residential competition throughout Washington cannot and do not substitute for the more granular data on which the UTC based its deregulatory orders." *UTC Comments*, at 9.

103 *See, e.g.*, Qwest Petition – Denver, at 12 ("Wireless service subscribers are undeniably using wireless service as a direct substitute for traditional wireline telephone services.").

simply incapable of offering the sort of quality service that customers demand and have come to expect. Currently, these critical features can only be provided by telephone companies or cable providers, a fact which Qwest completely overlooks.

While a small and slowly-increasing percentage of households have become wireless-only for their voice services, the vast majority of those consumers still access the Internet using a wireline connection, which remains an essential component of their communications needs. Indeed, a recent analysis concluded that "Comcast views a wireless offering as an add-on strategy to further extend its triple play bundle [which includes voice provided over wireline/cable facilities] and to reduce churn, rather than the next leg in the company's growth."[104] As such, wireless service today cannot substitute completely for wireline access lines – it is merely complementary. This shortcoming is particularly critical in the current context, where the Commission has been asked to forbear from enforcing Qwest's obligation to provide the UNEs required by many wireline service providers. Accordingly, the Commission should totally ignore the information proffered by Qwest regarding wireless services, as it did in the Omaha and Anchorage forbearance proceedings.

Even assuming, *arguendo*, that wireless service is capable, in theory, of serving as a complete substitute for mass market wireline service today or in a reasonably short time frame (which it is not), Qwest has still failed to meet its burden. In the merger proceeding involving AT&T and BellSouth, the merger applicants contended that wireless competition provided a material check on any potential competitive abuse resulting from their merger. Qwest, in its Petitions, contends that the Commission's analysis of the wireless services industry conducted in connection with the *AT&T-BellSouth Merger Order* "supports including wireless services in the

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104 *See* UBS Investment Research, Comcast Corporation Site Visit, 20 November 2006, at 2.

forbearance analysis."[105] In reality, the Commission was very guarded in its reliance upon wireless mobile services in any sort of competitive analysis. Indeed, only a small percentage of wireless subscribers, at most, were even deemed relevant to the Commission's evaluation. Specifically, the Commission concluded that mobile wireless services should be included within the product market for local services only with respect to the very limited number of customers who rely on mobile wireless service as a complete substitute for, rather than a complement to, wireline service.[106]

Here, where the Commission is being asked to consider forbearance from statutory unbundling requirements in the mass market,[107] there are even less compelling reasons to include wireless service in the competitive analysis. Qwest has offered no concrete evidence that wireless service has become an adequate substitute for wireline voice and broadband service. That is because it is not. Qwest does not offer any data regarding complete wireless substitution in the MSAs at issue.[108] While intermodal competition between wireline and mobile wireless services likely will increase in the future, wireless services do not yet enjoy the ubiquity,

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105 *See, e.g.,* Qwest Petition – Denver, at 12.

106 *See AT&T Inc. and BellSouth Corporation Application for Transfer of Control,* Memorandum Opinion and Order, WC Docket No. 06-74 (rel. Mar. 26, 2007) ("*AT&T-BellSouth Merger Order*"), at ¶ 96. *See also Verizon Communications Inc. and MCI Inc. Applications for Approval of Transfer of Control,* Memorandum Opinion and Order, 20 FCC Rcd 18433 (2005) ("*Verizon-MCI Merger Order*"), at ¶ 91. Moreover, in its merger proceeding involving Verizon and MCI, the New York Department of Public Service Staff noted that evidence that consumers view wireless as a substitute for traditional wireline service is mixed. *See NYS Staff White Paper*, at 23.

107 As explained above, Qwest does not even proffer wireless competition as a basis for forbearance in the enterprise market.

108 Qwest Petition – Denver, at 10-14; Qwest Petition – Minneapolis-St. Paul, at 11-15; Qwest Petition – Phoenix, at 10-14; Qwest Petition – Seattle, at 11-14.

capability, or the service quality to qualify as a suitable substitute for wireline service offerings.[109]

Significantly, Qwest offers no data at all regarding the number of small business users that have abandoned their wireline phone in favor of wireless services, and so therefore completely ignores this important component of the mass market. Because Qwest makes its case regarding the mass market's use of wireless alternatives based solely on residential wireless use, should the Commission consider wireless usage in the mass market in its forbearance analysis (which it should not), it should require Qwest to put forth its evidence regarding wireless substitutability among small business users and bifurcate the mass market and address small businesses and residential subscribers as separate markets for all purposes.[110]

In sum, wireless service, because of its inherent limitations, simply cannot substitute for wireline service today. At best, it remains a complement to wireline services. Qwest has failed to provide any concrete data that suggests otherwise. Moreover, even should the Commission find that wireless is a substitute for wireline service for mass market customers (which it should not), Qwest has provided inadequate information to permit the Commission to take wireless competition into account in conducting its Section 251(c)(3) forbearance analysis.

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109 *See, e.g., Triennial Review Order*, at ¶ 445.

110 The Commenters believe that residential and small business customers constitute separate markets. It is particularly appropriate to treat small business customers as a separate market since they are increasingly purchasing larger bandwidth circuits that are symmetric and have guaranteed service levels to meet their data requirements. Even if the Commission does not separate these two classes of customers, Qwest has the burden of producing evidence of facilities-based competition for both residential and small business customers, which it has not done.

3. Competition from Over-the-Top VoIP Providers

In addition to cable and wireless services, Qwest points to over-the-top VoIP services ("O/VoIP") in its attempt to demonstrate sufficient competition to warrant forbearance in the mass market.[111] These services are simply not a source of facilities-based competition, however, because, by definition, they ride the facilities of another provider, which in many cases is likely to be Qwest itself.[112] Qwest contends that O/VoIP services "represent[ ] an additional form of competition that bypasses Qwest" because O/VoIP calls "do not rely on Qwest's switched network."[113] Yet Qwest fails to admit that O/VoIP calls rely on an underlying broadband connection that in many cases is obtained from Qwest.[114]

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111 *See,* Qwest Petition – Denver, at 14-16; Qwest Petition – Minneapolis-St. Paul, at 15-17; Qwest Petition – Phoenix, at 14-16; Qwest Petition – Seattle, at 14-16. As with wireless services, Qwest does not rely on O/VoIP services to demonstrate competition in the enterprise market. While a number of carriers are beginning to integrate VoIP into their overall package of business services, these offerings are typically facilities-based and part of the larger service bundle demanded by business customers which stand-alone VoIP providers simply cannot match. Moreover, integration of such IP-enabled capabilities into a larger suite of business services is needed to meet the complex and diverse needs of an increasing number of small and medium-sized businesses in addition to enterprise business customers to ensure that they receive the quality of service they demand.

112 Indeed, Qwest is enjoying the benefits of the growth occurring in the high-speed Internet access market. The Commission's most recent report cites 26% nationwide growth in high-speed lines (*i.e.,* lines that deliver services at speeds exceeding 200 kilobits/second in at least one direction) and 15% growth in advanced services lines (*i.e.,* lines that deliver services at speeds exceeding 200 kilobits/second in both directions) during the first half of 2006. *High Speed Services for Internet Access: Status as of June 30, 2006,* Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, at 2-3 (Jan. 2007). The same report shows that in the six-month period from December 2005 to June 2006, high-speed lines increased by approximately 280,000 (from 882,669 to 1.166 million) in Colorado, by over 200,000 (from 855,753 to 1.058 million) in Minnesota, by more than 350,000 (from 1.04 million to 1.39 million) in Arizona, and by over 355,000 (from 1.22 million to 1.575 million in Washington State. *Id.,* Table 10. The report shows that ADSL lines are growing significantly faster than cable modem lines, and that the vast majority of ADSL lines are provided by Qwest and other Regional Bell Operating Companies ("RBOCs").

113 Qwest Petition – Denver, at 14.

114 Qwest cites Commission data showing that broadband access lines in each of the four states where the MSAs for which Qwest is seeking forbearance are located have grown significantly from December 2000 to June 2006, but Qwest fails to identify the number of

Qwest's claim that O/VoIP providers still should be considered as a source of competitive discipline on Qwest is baseless. In essence, because O/VoIP providers either use transport and loops provided by Qwest itself, other LECs, or cable companies, Qwest has accounted for these lines somewhere else in its Petitions. In short, to include VoIP in the analysis would be double-counting. Moreover, as pointed out by the Virginia State Corporation Commission ("VCC") in response to Verizon's request for Section 251(c)(3) loop and transport unbundling forbearance in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach MSAs,[115] granting forbearance from Section 251(c)(3) unbundling obligations would restrict the ability of carriers that rely on copper loops obtained from the ILEC to offer broadband services to their customers from participating in the broadband market.

Qwest has provided no empirical data regarding the extent to which O/VoIP services are being provided over Qwest's facilities versus the facilities of other facilities-based carriers in the relevant geographic markets.[116] In both the *Omaha Forbearance Order* and the *Anchorage Forbearance Order,* the Commission did not consider interconnected VoIP service in its analysis because data was not available that would allow it to refine its wire center analysis, as discussed above.[117] Qwest's Petitions do not try to remedy this shortcoming. Thus, the Commission should not (and cannot) include the retail market presence of O/VoIP providers in

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those broadband access lines it serves. *See* Qwest Petition – Denver, at 14; Qwest Petition – Minneapolis-St. Paul, at 15; Qwest Petition – Phoenix, at 14-15; Qwest Petition – Seattle, at 15.

115 *See* Comments of the Virginia State Corporation Commission, WC Docket No. 06-172, p. 7-8 (filed Dec. 15, 2006) ("*VCC Comments*").

116 Without knowing the extent to which Qwest's (or other wireline providers') lines are being used to support the O/VoIP providers, it is meaningless for Qwest to cite, in support of its Petitions, analyst reports which discuss the extent to which O/VoIP will displace local telephone access lines. *See, e.g.,* Qwest Petition – Denver, at 14 ("Industry experts forecast exponential VoIP growth through at least 2010.").

117 *Omaha Forbearance Order*, at ¶ 72. *See also Anchorage Forbearance Order*, at ¶ 29.

its analysis of whether there is sufficient facilities-based competition to warrant forbearance from Section 251(c)(3) unbundling obligations in the mass market or the enterprise market in any wire center in any of the four MSAs that are the subject of Qwest's Petitions.[118]

4. **Alternative Transport Facilities**

Qwest attempts to justify forbearance in the enterprise market within the four MSAs at issue on the purported existence of the "extensive competitive fiber networks" deployed by competitors.[119] Qwest's "proof" consists of figures purporting to represent the number of competitive fiber networks in each MSA. According to the data cited by Qwest, between "approximately 20" and "approximately 45" competitors operate fiber networks within the MSAs that are the subject of Qwest's Petitions.[120] Qwest offers maps purporting to show

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118 Moreover, even if the Commission were to conclude that O/VoIP competition should be taken into account in its Section 251(c)(3) forbearance analysis – which it should not – recent market difficulties and ongoing legal issues confronting the O/VoIP industry call into significant question the effectiveness and sustainability of O/VoIP-based competition. SunRocket, the nation's second-largest O/VoIP provider after Vonage, abruptly ceased operation in July 2007. *See, e.g.,* Matt Richtel, "Facing Much Bigger Competitors, Internet Phone Start-Up Closes," Washington Post, Jul. 16, 2007 ("The development underline[s] the struggles of start-ups trying to make a business out of providing Internet-based phone service . . . The companies face enormous pressure from the biggest competitors in the industry, both cable and traditional phone service providers."). Meanwhile, Vonage remains engaged in litigation brought by Verizon for patent infringement related to VoIP technology. Vonage's potential liability is in the hundreds of millions of dollars and industry analysts question the company's ability to survive. Marguerite Reardon, "Vonage to Pay $58 Million in Verizon Patent Case," CNETNews.com, Mar. 8, 2007, posted at http://news.com.com/2100-1036_3-6165747.html; Jim Duffy, "Vonage's Future Questioned After Latest Setback," Network World, Apr. 6, 2007, *available at* http://www.networkworld.com/news/2007/040607-vonage-on-brink.html?page=1.

119 *See* Qwest Petition – Denver, at 26; Qwest Petition- Minneapolis-St. Paul, at 26; Qwest Petition – Phoenix, at 26; Qwest Petition, - Seattle, at 26.

120 *Brigham/Teitzel Declaration - Denver*, at ¶ 34 (approximately 20 competitive fiber networks); *Brigham/Teitzel Declaration – Minneapolis/St. Paul*, at ¶ 37 (approximately 45 competitive fiber networks); *Brigham/Teitzel Declaration – Phoenix*, at ¶ 34 (approximately 24 competitive fiber networks); *Brigham/Teitzel Declaration – Seattle*, at ¶ 37 (approximately 20 competitive fiber networks).

these fiber routes within each MSA,[121] and represents that "these fiber facilities can be used to directly bypass a number of Qwest mass market and enterprise services."[122]

There are numerous fundamental problems with Qwest's competitive fiber route data. Specifically, Qwest does not present the data on a sufficiently granular basis to provide meaningful input to the Commission. For example, it merely claims that there is "[a]t least one fiber-based competitor [that] has facilities in **[Begin Proprietary] [End Proprietary]** of Qwest's wire centers in the Denver MSA, and these wire centers contain **[Begin Proprietary] [End Proprietary]** of Qwest's residential lines and **[Begin Proprietary] [End Proprietary]** of Qwest's retail business lines in the MSA."[123] Further, Qwest does not indicate how many competing fiber providers operate in each wire center, and it does not identify the fiber providers it claims are operating each route.[124]

Qwest also does not meet the Section 10 requirement that it identify which, if any, of these fiber networks reach, and can support the offering of a full range of services, within a commercially reasonably period of time, to individual customer locations. Qwest fails to acknowledge that merely passing a customer location does not necessarily enable the owner of competitive fiber to provide service at that customer location. While some competitive carriers

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121 *See, e.g., Brigham/Teitzel Declaration - Denver*, at Confidential Exhibit 4.

122 *Brigham/Teitzel Declaration - Denver*, at ¶ 38. *See also Brigham/Teitzel Declaration – Minneapolis/St. Paul*, at ¶ 38; *Brigham/Teitzel Declaration – Phoenix*, at ¶ 35; *Brigham/Teitzel Declaration – Seattle*, at ¶ 38.

123 Qwest Petition – Denver, at 26.

124 Indeed, Qwest's is not even specific regarding the precise number of competitive fiber providers in each MSA. *See Brigham/Teitzel Declaration - Denver*, at ¶ 34 (approximately 20 competitive fiber networks); *Brigham/Teitzel Declaration – Minneapolis/St. Paul*, at ¶ 37 (approximately 45 competitive fiber networks); *Brigham/Teitzel Declaration – Phoenix*, at ¶ 34 (approximately 24 competitive fiber networks); *Brigham/Teitzel Declaration – Seattle*, at ¶ 37 (approximately 20 competitive fiber networks).

have constructed fiber rings in geographic areas where they offer local exchange services, the vast majority of commercial buildings are not located on those fiber rings and the carriers must construct building "laterals" to serve customers located in those commercial buildings. The construction of laterals is extremely difficult, time consuming, and costly. According to XO Communications, LLC ("XO"), the extraordinary costs of constructing laterals results in XO not being able realistically to add a building to its network unless customer demand at that location exceeds three DS-3's of capacity.[125] Finally, Qwest fails to identify whether (and to what extent) the competitive fiber on its route maps is being used to provide telecommunications services (versus fiber being put to private use) and also fails to differentiate between fiber transport and fiber being used to provide local exchange access.

In the absence of this detail, there is no way to verify Qwest's representations or to substantiate its claims. In light of these myriad shortcomings, Qwest's representations regarding competitive fiber deployment should be ignored.

5. **Wholesale Service Offerings**

Qwest further attempts to justify its forbearance requests for the mass market and the enterprise market on the basis of wholesale alternatives to the use of its Section 251(c)(3) network elements.[126] Qwest's attempt to ground a Section 251(c)(3) forbearance determination on the purported existence of "attractive" wholesale alternatives – whether offered by itself or a third party – is impermissible. In the *Triennial Review Remand Order* the Commission firmly

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125 *See In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, RM-10593, *Declaration of Ajay Govil on Behalf of XO Communications, Inc.* (filed Aug. 8, 2007), at 10.

126 *See* Qwest Petition – Denver, at 16-17, 23-24; Qwest Petition- Minneapolis-St. Paul, at 17, 24-25; Qwest Petition – Phoenix, at 16, 24-25; Qwest Petition, - Seattle, at 16-17, 23-24.

established that the availability of wholesale alternatives should not foreclose unbundled access to a corresponding network element, even where a carrier could, in theory, use the wholesale alternative to enter a market.[127] In the words of the Commission: "It would be unreasonable to conclude that Congress created a structure to incent entry into the local exchange market, only to have that structure undermined, and possibly supplanted in its entirety, by services priced by, and largely within the control of, incumbent LECs."[128]

Qwest cites the *Omaha Forbearance Order* as support for its position,[129] but fails to acknowledge that non-Section 251(c)(3) wholesale offerings were irrelevant to the Commission's conclusions in that proceeding. In the *Omaha Forbearance Order*, the Commission firmly grounded its forbearance determinations on the existence of sufficient *facilities-based* competition by Cox in certain of Qwest's wire centers in the Omaha MSA.[130] Indeed, the Commission expressly concluded that "the record does not reflect any significant alternative sources of wholesale inputs for carriers in this geographic market."[131] While the Commission found "that Qwest's own wholesale offerings will continue to be adequate without unbundled loop and transport offerings,"[132] this conclusion was not material to its decision to grant partial forbearance in the Omaha MSA.[133]

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127 *Triennial Review Remand Order*, at ¶ 48.

128 *Id.*

129 *See, e.g.,* Qwest Petition – Denver, at 16; Qwest Petition- Minneapolis-St. Paul, at 17; Qwest Petition – Phoenix, at 16; Qwest Petition, - Seattle, at 16.

130 *Omaha Forbearance Order*, at ¶ 64.

131 *Id.*, at ¶ 67.

132 *Id.*

133 In the *Anchorage Forbearance Order*, the Commission likewise found the absence of "any significant alternative sources of wholesale inputs for carriers in the Anchorage study area," thus concluding that "continued access to [ACS's] loop facilities is important

Importantly, as discussed in Section IV.A, *supra,* in the *Omaha Forbearance Order*, the Commission established the requirement that sufficient *facilities-based* competition be present in each product and geographic market for which Section 251(c)(3) forbearance is sought[134] and the Commission defined a facilities-based competitor for purposes of its Section 251(c)(3) forbearance analysis as a carrier that can successfully provide local exchange and exchange access services *without relying on the ILEC's loops or transport* (*i.e.,* its wholesale network offerings).[135] The Commission specified that Section 251(c)(3) forbearance is warranted "only in locations where Qwest faces sufficient *facilities-based competition* to ensure that the interests of consumers and the goals of the Act are protected under the standards of section 10(a)."[136] Consequently, any competitive inroads in any of the four MSAs at issue here made possible through the use of Qwest wholesale offerings is, by definition, not relevant to the Commission's forbearance analysis. Qwest's failure to provide any market-specific evidence of facilities-based competition and its focus on purported competition that is dependent on continued use of its wholesale facilities and services is an attempt to end-run the Commission's forbearance requirements that should not be countenanced by the Commission.

Over the past seven years, Qwest has sought and been granted substantial deregulation of its retail business services by the Washington Commission. In the words of the

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even in wire centers there already is extensive competition." *Anchorage Forbearance Order*, at ¶ 30.

134 *Omaha Forbearance Order*, at n. 156, ¶ 69. *See also Anchorage Forbearance Order*, at ¶ 21.

135 *Omaha Forbearance Order*, at ¶ 64.

136 *Omaha Forbearance Order*, at ¶ 61 (emphasis supplied). Likewise, in the *Anchorage Forbearance Order*, the Commission limited the grant to ACS of relief from Section 251(c)(3) unbundling obligations to those "portions of its service territory . . . where a facilities-based competitor has substantially built out its network." *Anchorage Forbearance Order*, at ¶ 1.

Washington Commission, "it was the presence and scope of UNE-based competition from CLECs that was the primary basis for granting Qwest's competitive classification requests which effectively put the regulatory classification and treatment of Qwest's retail business services on equal footing with Qwest's competitors in Washington."[137] In its Petitions, as in Washington State, Qwest has touted the presence of UNE-based CLEC competition as justification for deregulation, yet if Qwest's Petitions were granted, the foundation for this competition (*i.e.*, the availability of UNEs) would cease to exist. Qwest cannot have it both ways.

a. Mass Market

Qwest has not presented any concrete, market-specific evidence of alternative sources of wholesale local services being offered by third parties to carriers that utilize Qwest's Section 251(c)(3) network elements to serve mass market customers in the four MSAs at issue. Qwest merely represents that it "has in fact made attractive wholesale offerings available even when it has no obligation to do so."[138] As discussed above, the wholesale alternatives proffered by Qwest are not relevant to the Commission's forbearance analysis because they enable competition that is reliant on the ILEC's loops and transport.

Even if Qwest's wholesale products and services were relevant to the Commission's forbearance determinations (which they are not), Qwest has not provided the detailed empirical data necessary for the Commission to take these alternatives into account in conducting its forbearance analysis.[139] Qwest's sole evidence regarding the "attractiveness" of

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137 *UTC Comments*, at 7.

138 Qwest Petition – Denver, at 16; Qwest Petition- Minneapolis-St. Paul, at 17; Qwest Petition – Phoenix, at 16; Qwest Petition, - Seattle, at 16.

139 Notably, one of the two wholesale services Qwest mentions is its offerings pursuant to the resale provisions of Section 251(c)(4) of the Act. *See* Qwest Petition – Denver, at 17; Qwest Petition- Minneapolis-St. Paul, at 17; Qwest Petition – Phoenix, at 16; Qwest

its wholesale offerings consists of two figures from December 2006 regarding the number of voice-grade equivalent lines using its resale and its Qwest Platform Plus/Qwest Local Service Platform ("QPP/QLSP") products.[140] This evidence is essentially meaningless. Qwest merely provides the number of voice-grade equivalent residential lines using its QPP/QLSP services and its Section 251(c)(4) resale offerings as of December 2006. Qwest fails to provide any data which shows whether the number of lines utilizing each product is increasing or decreasing.[141] This data – which is the sum and total of Qwest's proof regarding wholesale competition in the mass market – suffers from the same defect as the other data provided by Qwest to support its Petitions, *i.e.,* it is not sufficiently granular to be considered by the Commission.

If it were permissible to consider Qwest's QPP/QLSP services and its Section 251(c)(4) resale offerings in determining whether the Section 10(a) forbearance standard has been met by Qwest for the mass market, the relief Qwest requests must be denied because, notwithstanding Qwest's blanket statements regarding the appeal of these options as alternatives to the use of Qwest's Section 251(c)(3) UNEs to serve mass market customers, the fact is that these wholesale services do not represent economically-viable alternatives for CLECs.

With the elimination in the *Triennial Review Remand Order* of the ability to obtain TELRIC-based local switching,[142] many competitive carriers were left with few viable

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Petition, - Seattle, at 17. Clearly, Qwest is under a statutory obligation to make those offerings available.

140 Qwest's Qwest Platform Plus ("QPP") and Qwest Local Service Platform ("QLSP") are Qwest's unbundled network element platform ("UNE-P") replacement products. *See* Qwest Petition – Denver, at 16-17; Qwest Petition- Minneapolis-St. Paul, at 17; Qwest Petition – Phoenix, at 16; Qwest Petition, - Seattle, at 17. *See also* Highly Confidential Exhibit 2.

141 As shown below, the level of mass market competition from carriers utilizing Qwest's wholesale facilities and services is steadily decreasing.

142 *See Triennial Review Remand Order*, at ¶¶ 199-228.

alternative means to serve mass market customers. Those few carriers that could economically justify the deployment of a switch to serve mass market customers in particular locations – or to acquire another service provider with an existing switch – began to do so. Carriers without the financial means to self-provide switching, or the customer line density necessary for self-provided switching to be economically viable, stopped actively marketing their services to mass market customers. By June 2006, the most recent date for which the Commission has made data available, ILECs were providing 22% fewer UNE loops with switching (*i.e.,* the type of service arrangement represented by Qwest's QPP/QLSP products) than six months earlier.[143] Resold lines also are declining.[144] Overall, wireline competitive carriers are exiting the mass market. From June 2005 to June 2006, the number of residential lines served by CLECs declined by approximately 4 million (from 16.33 million to 12.37 million) and from December 2004 to June 2006 the decline was even more precipitous. During that 18-month period, CLEC residential lines dropped 7.4 million (from 19.81 million to 12.37 million).[145]

Qwest, notwithstanding the fact that it carries the burden of proof, has provided no evidence that these nationwide numbers – and the alarming trend they represent – are not applicable to the specific markets for which it is requesting forbearance.[146] If these numbers

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143 *Local Telephone Competition: Status as of June 30, 2006,* Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, at Table 4 (Jan. 2007) ("*June 2006 Local Competition Report*").

144 *Id.*

145 *June 2006 Local Competition Report*, Table 2.

146 The only data relevant to this issue offered by Qwest is the number of voice grade equivalent ("VGE") residential lines, as of December 2006, competitors were serving throughout the MSA using Qwest's QPP/QLSP products and the number of VGE residential lines, as of the same date, competitors were serving throughout the MSA using Qwest's Section 251(c)(4) resold services. *See, e.g.*, Qwest Petition – Denver, at 16-17, Highly Confidential Exhibit 2. This data, which is more than six months old (and is not sufficiently granular), does not permit any conclusions regarding trends.

truly are representative of the state of affairs within the four MSAs at issue here, and we maintain they are, Qwest's request for forbearance on the basis of the wholesale alternatives it has made available to wireline carriers serving the mass market must be denied.

In its comments, the Washington Utilities and Transportation Commission identified one aspect of Qwest's QPP/QLSP agreements "that raises doubt about the effectiveness of these agreements as commercial replacements for existing wholesale services."[147] The UTC stated that it recently reviewed 12 Qwest commercial agreements and found that a common element of each agreement, Section 4.6, contains a "troubling provision" that excuses poor wholesale performance by Qwest from the Washington State Qwest Performance Assurance Plan ("QPAP"), "which is the only remaining incentive in place to ensure reasonable and adequate wholesale service quality."[148]

Further, the recent experience of McLeodUSA in the Omaha MSA illustrates that the Commission should not take on faith Qwest's representations that its already unappealing wholesale alternatives will remain available to wireline competitors should forbearance be granted. McLeodUSA's Petition for Modification of the *Omaha Forbearance Order* requests that the Commission reinstate Qwest's Section 251(c)(3) loop and transport unbundling obligations in the Omaha MSA because the Commission's "'predictive judgment' that Qwest would offer wholesale access to dedicated facilities on reasonable terms and conditions once released from the legal mandate of Section 251(c) has proven incorrect."[149] McLeodUSA's repeated good faith attempts to negotiate replacement wholesale arrangements with Qwest have

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147 *UTC Comments*, at 14-15.

148 *Id.*, at 15.

149 *See McLeodUSA Petition*, at 1.

been colossally unsuccessful, and "Qwest has conclusively refused to negotiate wholesale pricing for voice-grade, DS1, and DS3 loops and transport for the nine affected wire centers."[150]

Qwest's refusal to negotiate wholesale rates following the *Omaha Forbearance Order* not only defies the Commission's predictive judgment regarding Qwest's behavior once Section 251(c)(3) forbearance was granted, but it also violates Qwest's obligation under Section 271(c)(2)(B) to provide unbundled access to local loops and transport at just and reasonable rates.[151] The Commission should not presume that Qwest would behave any differently in the Denver, Minneapolis/St. Paul, Phoenix or Seattle MSAs than it has in Omaha should it be successful in gaining Section 251(c)(3) forbearance in those four markets.

b. Enterprise Market

Qwest contends that forbearance from Section 251(c)(3) unbundling requirements is appropriate in the enterprise market because competitors in the four MSAs at issue are using Qwest's special access services to serve enterprise customers.[152] Qwest cites the *Omaha Forbearance Order* for the proposition that enterprise competition which relies on Qwest's special access services supports the conclusion that Section 251(c)(3) unbundling obligations are no longer necessary to ensure that the prices and terms of its last-mile and interoffice transport offerings are just and reasonable and not unreasonably discriminatory.[153] Once again, Qwest misconstrues the *Omaha Forbearance Order*. There, the Commission took notice of the fact that "a number of carriers have had success competing for enterprise services using DS1 and DS3

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150 *Id.*, at 4.

151 *Id.*, at 10.

152 *See, e.g.*, Qwest Petition – Denver, at 24 ("As in Omaha, competitors in the Denver MSA are competing extensively using Special Access obtained from Qwest.").

153 *Id.*, at 23 (citing *Omaha Forbearance Order*, at ¶ 68).

special access channel terminations obtained from Qwest"[154] and found that special access-based competition "supports our conclusion that section 251(c)(3) unbundling obligations are no longer necessary"[155] but, importantly, the Commission did not base its decision to grant Qwest limited Section 251(c)(3) forbearance on the existence of special access-based competition.[156]

There are several important reasons why the Commission should not take into account special access-based competition here. First, the paltry data Qwest offers regarding enterprise competition using special access is not geographic market-specific.[157] Second, Qwest has produced no evidence that any carrier relying on its special access service is competing successfully in the local exchange market in any area. As pointed out by the Commission in the *Triennial Review Order*, "a carrier's use of tariffed incumbent LEC offerings does not conclusively demonstrate that it is doing so successfully, or should continue to do so."[158]

Third, there is significant record evidence in the Commission's *Special Access Reform Proceeding*[159] and elsewhere that Phase I and Phase II incumbent LEC pricing flexibility for special access services has resulted in higher special access prices and that reform of special

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154 *Omaha Forbearance Order*, at ¶ 68.

155 *Id.*

156 Moreover, in the *Anchorage Forbearance Order*, GCI's reliance on ACS's wholesale services, including its special access circuits, compelled the Commission to order ACS to continue to provide access to its loop facilities throughout the Anchorage study area, including in wire centers where forbearance from section 251(c)(3) unbundling was granted. *See Anchorage Forbearance Order*, ¶ 38 ("we find that a continuing obligation of ACS to provide access to loops and subloops at commercially reasonable rates is necessary to justify the relief we grant ACS today . . .").

157 *See* Qwest Petition – Denver, at 23-24; Qwest Petition- Minneapolis-St. Paul, at 24-25; Qwest Petition – Phoenix, at 24-25; Qwest Petition, - Seattle, at 24.

158 *Triennial Review Order*, at ¶ 64.

159 *See, e.g.,* Comments of XO Communications, LLC, Covad Communications Group, Inc. and NuVox Communications, WC Docket No. 05-25, RM-10593 (filed Aug. 8, 2007) ("*XO et al. Special Access Comments*").

access pricing rules is in order.[160] The Commenters recently compiled and analyzed a sampling of ILEC rates – including rates for Qwest in Arizona and Colorado – which demonstrated that the rates for special access channel terminations and mileage today are, with rare exception, significantly higher than for comparable UNE rates, indicating that special access rates are excessively above cost and are therefore unjust and unreasonable.[161] The Commenters' analysis showed, for example, that the price cap month-to-month recurring rate for DS1 loops/channel terminations is 67% higher than the corresponding DS1 UNE rate in Arizona.[162] Similarly, the price cap one-year term commitment DS1 channel termination rate is 62% higher than the corresponding DS1 UNE rate in Arizona.[163] Moreover, Qwest's special access non-recurring charges ("NRCs") in Arizona and Colorado are 75% to 85% higher than the UNE NRCs in those states and apply even when a customer commits to a three-year term.[164] Therefore, absent meaningful special access reform, it cannot be concluded that Qwest's pricing behavior would lead to just and reasonable rates for necessary local network facilities if Section 251(c)(3) forbearance is granted.[165]

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160 *See UTC Comments*, at 11 ("Contrary to the expectations set forth in the Commission's Pricing Flexibility Order, it appears that pricing flexibility has allowed incumbent LECs to raise prices in those areas where competition is ostensibly most vigorous.").

161 *See XO et al. Special Access Comments*, at 16-20, Attachment 2.

162 *Id.*, at Attachment 2.

163 *Id.*

164 *Id.*

165 A group of seven CLECs filed joint comments with the Minnesota Public Utilities Commission ("MN PUC") last week in a MN PUC proceeding regarding Qwest's forbearance petition for the Minneapolis-St. Paul MSA in which they provided evidence that Qwest's special access rates are dramatically higher than its UNE rates in the Minneapolis-St. Paul MSA. Comments of the CLEC Coalition, MPUC Docket No. P421/CI-07-661 (filed Aug. 17, 2007) ("*CLEC Coalition Comments*"), at 12-14. According to the CLEC Coalition, "the highest current UNE DS1 loop rate in the Twin Cities MSA is $36.54 (zone 3). Under Qwest's current interstate special access tariff for Minnesota, CLECs would pay $132.25 for the same facility, a 262% increase. Even with

Finally, while it makes no reference in its Petitions to alternative wholesale sources of supply for carriers serving the enterprise market, the Brigham/Teitzel Declaration accompanying Qwest's Petitions mentions that "wholesale services are now offered by several carriers as an alternative to Qwest's wholesale services."[166] In support of this statement, Qwest provides a list of companies, including AT&T, Eschelon, Granite Telecommunications, McLeodUSA, Trinsic, and Verizon, that have "all self-reported to the FCC that they are offering 'carrier's carrier' services to other telecommunications providers."[167] Qwest produces absolutely no evidence that any of these carriers is in fact offering commercially-viable alternative wholesale last-mile facilities and services any wire center in any of the four MSAs at issue. Instead, Qwest includes selected promotional statements and press releases pulled from company websites for a few of these carriers.[168] These unsupported statements are hardly probative of the nature and extent (if any) of wholesale alternatives to Qwest's special access service for carriers serving the enterprise market in those four MSAs. Consequently, this "evidence" should be ignored by the Commission.

The lack of wholesale alternatives to Qwest's special access services has been documented in recent comments to the Minnesota Public Utilities Commission. The Minnesota Commission has initiated a proceeding to inquire into Qwest's petition seeking forbearance in

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the largest discount available in Qwest's special access tariff – the Regional Commitment Plan ('RCP') – the $36.54 price would increase by 182% to $103.15." *Id.*, at 12-13 (footnote omitted).

166 *See Brigham/Teitzel Declaration - Denver*, at ¶ 50. *See also Brigham/Teitzel Declaration – Minneapolis/St. Paul*, at ¶ 54; *Brigham/Teitzel Declaration – Phoenix*, at ¶ 47; *Brigham/Teitzel Declaration – Seattle*, at ¶ 52.

167 *Brigham/Teitzel Declaration - Denver*, at ¶ 50.

168 *See, e.g., Brigham/Teitzel Declaration - Denver*, at ¶¶ 51-56.

the Minneapolis-St. Paul MSA.[169] In response to the Minnesota Commission's request for comment on Qwest's forbearance request, a coalition of seven CLECs ("CLEC Coalition") provided evidence that there are no significant alternatives to Qwest's last-mile facilities and limited alternatives to Qwest's interoffice transport facilities in the Minneapolis-St. Paul MSA.[170] The CLEC Coalition submitted affidavits/declarations of Eschelon, Integra, McLeodUSA, Popp.com, TDSM, and XO detailing the extent to which competitive carriers depend on access to Qwest's last-mile network and its interoffice transport facilities to reach their customers.[171] The CLEC Coalition concluded that "continued enforcement of Section 251(c)(3) obligations remains necessary because Qwest holds a monopoly throughout the Twin Cities MSA in the wholesale market for the network facilities carriers need to provide competitive telecommunications services."[172]

V. QWEST HAS NOT SHOWN IT IS ENTITLED TO RELIEF FROM DOMINANT CARRIER OR COMPUTER III REQUIREMENTS

In addition to its request for forbearance from Section 251(c)(3) unbundling obligations, Qwest requests relief from Part 61 dominant carrier tariffing requirements, dominant carrier requirements arising under Section 214 of the Act and Part 63 of the Commission's rules, and the Commission's Computer III rules, including CEI and ONA requirements.[173] Again, Qwest has failed to demonstrate that continued enforcement of these requirements is not

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169 *Minnesota Public Utilities Inquiry Regarding the Petition for Qwest Corporation, Filed with the Federal Communications Commission, for Forbearance Pursuant to 47 U.S.C. Section 160(c) in the Minneapolis-St. Paul Metropolitan Statistical Area*, Docket No. P-421/CI-07-661, Minnesota Public Utilities Commission.

170 *CLEC Coalition Comments*, at 5-10.

171 *Id.*, at Exhibits 1-8.

172 *Id.*, at 5.

173 *See* n. 3, *supra.*

necessary to ensure that its charges and practices are just and reasonable and not unreasonably discriminatory, and that enforcement is not necessary for the protection of consumers. As noted by the Washington Utilities and Transportation Commission, "[e]liminating the obligation to comply with Part 61 [dominant carrier tariff] regulations would result in a lack of controls over the pricing of interstate special access services on which Qwest's competitors in the Seattle MSA rely. Further, it would mean that Qwest could deaverage or assess higher special access prices to its wholesale competitors compared to those charged to end users."[174]

As noted by the Commission in the *Omaha Forbearance Order*, forbearance from dominant carrier regulation is justified only if the state of competition is such that the interests of consumers and competition would be protected in the absence of the regulations at issue.[175] In the Omaha forbearance proceeding, the Commission noted that dominant carrier regulations initially were imposed on ILECs, including Qwest, as a result of a Commission determination that those carriers "have market power in the provision of most services within their service area."[176] Consequently, forbearance from dominant carrier regulation must be preceded by a finding that the ILEC seeking forbearance no longer has market power in the provision of the services for which it seeks forbearance.[177]

Market share; supply and demand elasticities; and the firm's cost, structure, size, and resources are all relevant to the Commission's analysis of whether the ILEC seeking

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174 *UTC Comments*, at 10.

175 *Omaha Forbearance Order*, at ¶ 19.

176 *Id.*, at ¶ 11. The Commission defines market power as the "'ability to raise prices by restricting output' or 'to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable.'" *Id.*, at n. 54.

177 *Id.*, at ¶ 22.

freedom from dominant carrier regulation retains market power.[178] In granting Qwest forbearance from certain dominant carrier regulations with respect to its mass market exchange access services and its mass market broadband Internet access services in the *Omaha Forbearance Order*, the Commission found that each of these economic factors justified forbearance.[179]

Here, Qwest has failed to provide any data to evaluate these factors. Indeed, Qwest fails to address these factors at all in its Petitions. In the absence of any market-specific information that may be used to evaluate Qwest's market share, as well as the other economic factors relevant to an analysis of whether dominant carrier regulation is necessary to protect consumers and competition, the Commission should conclude that Qwest has failed to meet its burden of proof and Qwest's request for forbearance from dominant carrier rules should be denied.

Similarly, Qwest has failed to meet its burden of proof that forbearance from the Computer III requirements is justified. The only mention Qwest makes of Computer III in its Petitions is in the introductory footnote where Qwest identifies with specificity the statutory and regulatory provisions from which it seeks forbearance.[180] Qwest makes absolutely no effort whatsoever to explain how or why forbearance from Computer III requirements would be consistent with the public interest or how or why enforcement of those requirements is not necessary either to ensure that Qwest's rates, terms and conditions of service are just, reasonable

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178 *Id.*, at ¶ 31.

179 *Id.*, at ¶¶ 39-43.

180 *See, e.g.,* Qwest Petition – Denver, at 3.

and nondiscriminatory or to protect consumers. Denial of Qwest's request for forbearance from the Commission's Computer III rules therefore must follow.

VI. SECTION 271 IS NOT A SUFFICIENT BACKSTOP TO DEVELOP AND PRESERVE COMPETITION IF FORBEARANCE IS GRANTED

Although the Commission in the *Omaha Forbearance Order* partially granted Qwest's request for forbearance from the obligations of Section 251(c)(3), the Commission did so only while declining to forbear from similar requirements under the competitive checklist contained in section 271(c)(2)(B)(iv) through (vi) of the Act.[181] The Commission reiterated that "checklist items 4 through 6 establish independent and ongoing obligations for BOCs to provide wholesale access to loops, transport and switching, irrespective of any impairment analysis under section 251 . . ."[182] and that "Qwest has not shown that checklist items 4 through 6 are unnecessary to ensure that Qwest's charges and practices are just and reasonable and not unreasonably discriminatory . . ."[183] Indeed, the Commission's willingness to grant Qwest partial Section 251(c)(3) forbearance was grounded significantly on the ongoing applicability of Section 271's network element requirements.[184]

Similarly, the Commission's decision to grant ACS partial forbearance from its Section 251(c)(3) unbundling obligations in Anchorage was conditioned on the continued availability of loop access.[185] Noting that because ACS is not a BOC, and therefore is not

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181 *Omaha Forbearance Order*, at ¶ 100.

182 *Id.*

183 *Id.*

184 *Id.*, at ¶ 64 ("We also rely on the continued operation of other provisions of the Act designed to develop and preserve competitive local markets, including particularly the other obligations arising under sections 251(c) and 271(c) that apply to Qwest from which we do not forbear today."). *See also id.*, at ¶ 62.

185 *Anchorage Forbearance Order*, at ¶¶ 39-40.

subject to the requirements of Section 271, the Commission conditioned its grant of forbearance on an obligation that "mirrors the section 271 checklist obligation the Act imposes on BOCs that have obtained section 271 approval . . ."[186] Specifically, the Commission compelled ACS to continue to provide legacy loop access at just and reasonable and not unreasonably discriminatory rates upon expiration of the one year transition period adopted by the Commission.[187] The Commission imposed this condition as a "prerequisite to [its] grant of forbearance," concluding that "absent this condition . . . [it] would not be able to conclude that the criteria of section 10 are met."[188]

The evidence is quite clear, however, that Section 271(c)'s competitive checklist obligations cannot be relied on to discipline Qwest's behavior. As discussed in Section IV.A.2, *supra*, Qwest's post-forbearance market behavior in the Omaha MSA clearly shows that the obligations contained in Section 271 cannot be relied upon to ensure just and reasonable charges and practices. As a threshold matter, it is unclear whether Qwest even has made any Section 271 offering available in the Omaha MSA. According to McLeodUSA, despite repeated attempts, Qwest has failed to provide a proposed Section 271 pricing list.[189] McLeodUSA has surmised that by Qwest's silence, it continues to maintain that its special access offerings, in particular, its tariffed Regional Commitment Plan ("RCP"), satisfies its Section 271 obligation.[190] If Qwest does, in fact, contend that its special access services meet its Section 271 obligation to make

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186 *Id.*, at ¶ 41.

187 The Commission mandated use of the rates for DS0 and DS1 loops currently in effect in Fairbanks, Alaska until such time as alternative rates are agreed to by ACS and GCI. *Id.*, at ¶ 39.

188 *Id.*, at ¶ 40.

189 *McLeodUSA Petition*, at 8.

190 *Id.*

unbundled loops and transport available at just and reasonable rates, the Commission has no choice but to conclude that Qwest is not in compliance with Section 271, since the evidence is incontrovertible that Qwest's special access rates far exceed just and reasonable levels.[191]

Qwest's actions in Omaha are consistent with its general position – and the position of the other Regional Bell Operating Companies ("RBOCs") – that the market should be relied upon to set rates and terms for Section 271 network elements and the process should be free from oversight or approval by regulators. The legal questions surrounding whether state and/or federal regulators have the authority to set rates and terms for Section 271 checklist elements, or whether these matters will be left to the market, is currently being litigated in multiple jurisdictions with varying results.[192] The RBOCs – including Qwest – are taking

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191 *See* Section IV.B.5.b, *supra.*

192 *See, e.g., Petition of DIECA Communications, Inc., d/b/a Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corporation*, Docket No. T-01051B-04-0425, Decision No. 68440, 2006 Ariz. PUC LEXIS 5 (Ariz. C. C. Feb. 2, 2006), *Qwest Corp. v. Ariz. Corp. Comm'n*, __ F. Supp. 2d __, 2007 WL 2068103 (D. Ariz.) (July 17, 2007) (granting Qwest's request for declaratory and injunctive relief); *Application of Pacific Bell Telephone Company d/b/a SBC California for Generic Proceeding to Implement Changes in Federal Unbundling Rules Under Sections 251 and 252 of the Telecommunications Act of 1996*, Application 05-07-024, Decision Adopting Amendment to Existing Interconnection Agreements, 2006 Cal. PUC LEXIS 33 (Cal. P.U.C. Jan. 26, 2006); *Qwest Corp. v. Pub. Util. Comm'n of Colorado*, 2006 WL 771223 (D. Colo. 2006), *aff'd*, 479 F.3d 1184 (10th Cir. 2007); *In the Matter, on the Commission's Own Motion, to Commence a Collaborative Proceeding to Monitor and Facilitate Implementation of Accessible Letters Issued by SBC Michigan and Verizon*, Case No. U-14447, Order, 2005 Mich. PUC LEXIS (Mich. P.S.C. Sep. 20, 2005), *appeal pending, Michigan Bell Tel. Co., d/b/a AT&T Michigan v. Covad Communications Company et al.*, No. 2:06-CV-11982 (E.D. Mich.) (filed Apr. 28, 2006); *In the Matter of a Potential Proceeding to Investigate the Wholesale Rates Charged by Qwest*, Docket No. P-421/CI-05-1996, Notice and Order for Hearing, 2006 PUC LEXIS 48 (Minn. P.U.C. May 4, 2006); *Proposed Revisions to Tariff NHPUC No. 84 (Statement of Generally Available Terms and Conditions); Petition for Declaratory Order re Line Sharing)*, Docket Nos. DT 03-201 and 04-176 (consol.), Order No. 24,442, Order Following Brief, 2005 N.H. PUC LEXIS 24 (N.H. P.U.C. Mar. 11, 2005), *rev'd in part, Verizon New England, Inc. v. N.H. Pub. Utils. Comm'n*, No. 05-CV-94-PB (D. N.H. 2006), *appeal pending, Verizon New England, Inc. v. N.H. Pub. Utils. Comm'n*, No. 06-2429 (1st Cir.) (filed Sep. 21, 2006). *See also, e.g., BellSouth Emergency Petition for the Declaratory Ruling and Preemption of State Action*, WC Docket No. 04-245 (filed Jun.

advantage of the current unsettled environment by refusing to honor their statutory obligation to make Section 271 checklist elements available at just and reasonable, and not unreasonably discriminatory, rates and terms. Consequently, until the law becomes settled, the bare existence of an ongoing obligation under Section 271 to make loops and transport available cannot be relied upon to police Qwest's behavior and to ensure that competitors are afforded competitively-viable access to the facilities they need to provide service to consumers.

The RBOCs' position that the commercial negotiation process should be relied upon to set Section 271 rates and terms would not be so problematic if the commercial negotiation process could be relied upon to result in rates and terms for Section 271(c) checklist items that further Congress' and the Commission's goal "to develop and preserve competitive

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24, 2004); *Georgia Public Service Commission Petition for Declaratory Ruling and Confirmation of Just and Reasonableness of Established Rates*, WC Docket No. 06-90 (filed Apr. 18, 2006); *In Re: Generic Proceeding to Examine Issues Related to BellSouth Telecommunication, Inc.'s. Obligations to Provide Unbundled Network Elements, Docket No. 19341-U, Order Initiating Proceeding to Set Just and Reasonable Rates Under Section 271*, 2006 Ga. PUC LEXIS 3 (Ga. P.S.C. Jan. 17., 2006) and *Order Setting Rates Under Section 271*, 2006 Ga. PUC LEXIS 21 (Ga. P.S.C. Mar. 8, 2006), *appeal pending, BellSouth Telecomm., Inc. v. Georgia Pub. Serv. Comm'n et al.*, No. 1:06-CV-00162-CC and *Competitive Carriers of the South, Inc. et al. v. Georgia Pub. Serv. Comm'n*, No. 1:06-CV-0972-CC (consolidated) (N.D. Ga.) (filed Jan. 24, 2006); *XO Illinois Petition for Arbitration of an Amendment to an Interconnection Agreement with Illinois Bell Telephone Company Pursuant to Section 252(b) of the Communications Act of 1934, As Amended,* Docket No. 04-0371, Amendatory Arbitration Decision 66-67 (Ill. C. C. Oct. 8, 2004), *granted in part and denied in part, Illinois Bell Tel. Co. v. O'Connell-Diaz*, No. 05 C 1149, 2007 WL 2796488 (N.D. Ill. Sept. 28, 2006); *BellSouth Telecommunications, Inc.'s Notice of Intent to Disconnect Southeast Telephone Inc. for Non-Payment and Southeast Telephone Inc. and Southeast Telephone Inc. v. BellSouth Telecommunications, Inc.*, Case Nos. 2005-00533 and 2005-00519 (consolidated), Order, 2006 Ky. PUC LEXIS 680 (Ky. P.S.C. Aug. 16, 2006), *appeal pending, BellSouth Telecomm., Inc. v. Kentucky Pub. Serv. Comm'n et al.*, 3:06-CV-00065-KKC (E.D. Ky.) (filed Sep. 12, 2006); *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Docket No. 2002-682, Order Part II (Me. P.U.C. Sep. 3, 2004), *aff'd, Verizon New England Inc. v. Maine Pub. Utils. Comm'n*, 441 F. Supp. 2d 147 (D. Me. 2006), *appeal pending, Verizon New England Inc. v. Maine Pub. Utils. Comm'n,* No. 06-2151, (1st Cir.) (filed Jul. 19, 2006).

local markets."[193] But that is not the case. Qwest's response to carriers that must replace Qwest's Section 251(c)(3) loop and transport elements in wire centers and on routes that have been de-listed is not to enter into an arms-length, good faith negotiation process. Instead, Qwest merely provides competitors with a "take-it-or-leave-it" choice among its special access offerings. Regretfully, Qwest's special access offerings fall far short of the mark.

In light of Qwest's marketplace behavior in the Omaha MSA and more generally, in order to justify forbearance from Section 251(c)(3) unbundling requirements, it is not enough for the Commission to passively note Qwest's ongoing statutory obligations under Section 271(c)(2)(B). The Commission must find that Qwest has produced evidence that it is consistently meeting its Section 271(c)(2)(B) obligations (and is acting consistently with the requirements of Section 10(a)) through the offering of rates and terms for loops and transport that are just and reasonable and not unreasonably discriminatory. Qwest cannot sustain its burden that its treatment of special access meets its obligations under items 4 and 5 of the Section 271(c)(2)(B) competitive checklist and would provide a sufficient backstop to protect consumers and competition if Section 251(c)(3) unbundling of loops and transport were to be granted by the Commission. Consequently, Qwest's requested Section 251(c)(3) forbearance relief should be denied.

VII. A GRANT OF FORBEARANCE WOULD NOT BE IN THE PUBLIC INTEREST

Beyond Qwest's failure to demonstrate that ongoing Section 251(c)(3) unbundling and dominant carrier regulations are not necessary to ensure that its charges and practices are just and reasonable and likewise are unnecessary for the protection of consumers, as discussed above, it is clear that the Qwest Petitions are not consistent with the public interest,

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193 *Omaha Forbearance Order*, at ¶ 64.

and therefore do not satisfy the third prong of the Section 10(a) test. There are several reasons compelling the conclusion that the grant of forbearance to Qwest in the four MSAs at issue would run counter to the public interest. And it is not an exaggeration to suggest that granting forbearance would have significant deleterious public interest impacts that would extend far beyond the four MSAs under consideration here.

A. Competition Would Be Diminished If Forbearance Is Granted

In the *Omaha Forbearance Order*, the Commission analyzed the third prong of the Section 10(a) test (*i.e.*, whether forbearance from the unbundling obligations of Section 251(c)(3) would be in the public interest) largely on the basis of the actual competition which existed within the Omaha MSA. The Commission noted that the factors upon which it based its conclusions regarding satisfaction of the first two prongs of the Section 10(a) standard "also convince us that granting Qwest forbearance from the section 251(c)(3) access obligation for loop and transport elements would be consistent with the public interest under Section10(a)(3)."[194] The principal factor guiding the Commission in the Omaha case, of course, was evidence of sufficient facilities-based competition. Likewise, in the *Anchorage Forbearance Order*, the Commission based its grant of forbearance on the fact that "ACS is subject to a significant amount of competition in the Anchorage study area."[195]

As discussed above, Qwest has not demonstrated sufficient competition from cable companies, wireless service providers, O/VoIP providers, alternate transport providers, or other sources in any of the subject MSAs. Accordingly, not only has Qwest failed to meet the

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194 *Omaha Forbearance Order*, at ¶ 75.

195 *Anchorage Forbearance Order*, at ¶ 49.

first two prongs of the Section 10(a) standard, it has failed to satisfy the public interest standard under Section 10(a)(3).

In the *Omaha Forbearance Order*, the Commission also found that the costs of continued Section 251(c)(3) unbundling outweighed the benefits;[196] something which Qwest claims is true generally in each of the four MSAs that are the subject of its current Petitions.[197] The Commission concluded that the "costs [of unbundling] are unwarranted and do not serve the public interest once local exchange and access markets are sufficiently competitive, as is the case in certain limited areas of the Omaha MSA."[198] Here, because Qwest has failed to demonstrate, in any of the four metropolitan areas that are the subject of its Petitions, sufficient competition in any relevant geographic market, the Commission has no basis to conclude, even "in certain limited areas of the [subject] MSA[s]," that the costs of unbundling outweigh the benefits.

More particularly, Qwest offers no evidence in its Petitions that the regulations at issue are hindering its ability to compete. Rather, despite the costs of unbundling, competition and consumer interests will continue to benefit from unbundling throughout the four MSAs.[199] Indeed, the evidence is compelling that competitive conditions in these MSAs are such that

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196 *Omaha Forbearance Order*, at ¶¶ 76-77.

197 *See* Qwest Petition – Denver, at 28; Qwest Petition- Minneapolis-St. Paul, at 28; Qwest Petition – Phoenix, at 29; Qwest Petition, - Seattle, at 28.

198 *Omaha Forbearance Order* at ¶ 77.

199 Qwest claims that the unbundling requirements in the subject MSAs are "excessive." *See, e.g.,* Qwest Petition - Denver, at 28. Because Qwest has failed to meet its burden to demonstrate sufficient competition in any of the four MSAs, it has no foundation for this assertion. As a result of this failure, any assertion that its unbundling obligations are "excessive" reduces to the untenable assertion that *any* of its unbundling obligations are excessive, a conclusion which is totally at odds "with Congress's clear intent in Section 10 to sunset *in a narrowly tailored fashion* any regulatory requirements that are no longer necessary in the public interest so long as consumer interests and competition are protected." *See Omaha Forbearance Order*, at ¶ 40 (emphasis supplied).

continued unbundling is required because market forces alone cannot be relied upon to sustain competition.

Qwest relies in part on the competition provided by "wireline CLECs" to support its requested relief in both the mass market and the enterprise market.[200] Yet these competitors in the Qwest incumbent local operating territory – including the Commenters – continue to rely overwhelmingly on Qwest-provided unbundled loop and transport UNEs to serve their hundreds of thousands of customers located throughout the Qwest footprint. As discussed in detail herein, these service providers have no practical alternatives to use of Qwest's wholesale network facilities, particularly Qwest's last mile capabilities, to reach consumers. If the current regulatory obligation on Qwest to make these wholesale inputs available to competitors on cost-based (*i.e.,* TELRIC) rates and terms were to disappear through forbearance, it is difficult to see how consumers and competition would benefit. Indeed, the result would almost certainly be the opposite; competitors would be forced to purchase loops and transport facilities are substantially higher rates, driving some out of the market entirely and forcing the remaining carriers to raise rates and limit service options – particularly harmful outcome for residential and small business users.

Qwest also contends that "[e]liminating unbundling regulation will 'further the public interest by increasing regulatory parity' between telecommunications providers" in the subject MSAs.[201] Qwest argues that because it is losing customers to intermodal competitors, it would be in the public interest to end allegedly unequal regulation between the different

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200 *See* Qwest Petition – Denver, at 9-10, 22-24; Qwest Petition- Minneapolis-St. Paul, at 9-10, 23-25; Qwest Petition – Phoenix, at 9-10, 23-25; Qwest Petition, - Seattle, at 9-10, 22-24.

201 *See, e.g.,* Qwest Petition – Denver, at 29 (*quoting Omaha Forbearance Order*, at ¶ 78).

technological modes of delivery. In the *Omaha Forbearance Order*, however, the Commission made clear that the impetus to create technological parity is warranted only "[o]nce the benefits of competition have been sufficiently realized and competitive carriers have constructed their own last-mile facilities and their own transport facilities."[202] As shown herein, there is not yet sufficient actual competition from wireless, cable, O/VoIP, or other service providers in any of the four MSAs that are the subject of Qwest's Petitions. Steps taken to establish technological parity cannot precede the emergence of sufficient competition but, instead, must effectively derive from it. Given the state of the market in the four MSAs at issue and Qwest's failure to meet its burden of proof, establishing regulatory parity at this time in any of the four MSAs would be unwarranted, premature, and certainly *not* in the public interest.[203]

In making its public interest determinations, Section 10(b) requires the Commission to consider whether forbearance "will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."[204] A finding that forbearance will promote competition could form the basis for a conclusion that forbearance is in the public interest. At the same time, however, a mere finding that forbearance would not be detrimental to the public is not enough. The Commission must not only establish that forbearance would not unduly *harm* consumers and competition, it also must find that substantial competitive *benefits* would arise from forbearance.

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202 *Omaha Forbearance Order*, at ¶ 78.

203 Notably, Qwest fails to make the argument, relied upon by the Commission in the *Omaha Forbearance Order*, that forbearance would motivate Qwest to compete vigorously on both a retail and a wholesale basis. *See Omaha Forbearance Order*, at ¶¶ 79-81.

204 47 U.S.C. § 160 (b).

Qwest has failed to establish such benefits would accrue to the public and, accordingly, the Commission should conclude that the Section 10 standard has not been met.

B. Consumers Would Be Harmed If Forbearance Is Granted

Section 10(a)(3) compels the Commission to give great weight to the interests of *consumers* in the MSAs at issue. Careful consideration of the current state of competition in the four MSAs at issue leads inexorably to the conclusion that consumers in Denver, Minneapolis-St. Paul, Phoenix, and Seattle would suffer significant harm should forbearance be granted.

As discussed above, competitive carriers continue to rely on Qwest's loops and transport facilities to reach their customers. Continued access to Qwest's loops and transport under Section 251(c)(3) at TELRIC rates is critically important to carriers serving either the mass market or the enterprise market within the four MSAs at issue. Unfortunately, widespread wholesale alternatives to use of Qwest's facilities and services do not presently exist, nor are they on the horizon, and complete self-supply generally is not practically or economically feasible. The ability to use Qwest's network at cost-based rates remains absolutely essential to ensure that consumers of competitive carriers continue to enjoy the value-added competitive services they currently enjoy today and to take advantage of the competitive innovations of tomorrow.

For example, Covad Communications purchases DS0 UNE loops from Qwest and uses them in conjunction with its own next-generation ADSL2+ facilities to offer a Line Powered Voice ("LPV") product which provides residential customers value-added bundles of local and long distance voice and high-speed Internet access with speeds of up to 25 mbps for a single monthly fee. EarthLink currently uses LPV to make its "DSL & Home Phone" service

available in 11 major cities, including the Seattle MSA.[205] Covad expects to make similar LPV service offerings available to other wholesale partners for residential and/or business use and directly to its own business customers in the future.[206] Similarly, XO uses DS0 loops in association with Ethernet over copper technologies deployed in XO's network to enable the provision of broadband services at multi-megabit per second speeds not thought possible only a few years ago. In addition, technologies available today can support numerous simultaneous streams of high-definition video, becoming a formidable competitive alternative to the hybrid fiber-coax ("HFC") plant of cable providers and the FTTH/FTTC/fiber-to-the-node plant of the incumbent LECs. Absent DS0 UNE loops, competitors' ability to provide these innovative competitive service offerings could be significantly curtailed.

Because competitive carriers remain reliant on access to Qwest's loop and transport UNEs, the grant to Qwest of forbearance from UNE unbundling obligations (including TELRIC pricing) would force competitive carriers to raise prices, narrow their service offerings, and curtail the introduction of innovative products and services. Thus, millions of consumers in the four MSAs at issue soon would be faced with fewer carrier and service choices and, perhaps most importantly, higher prices.

This concern caused the Washington Utilities and Transportation Commission to register its opposition to the forbearance requested by Qwest in the Seattle MSA. In its comments, the Washington Commission stated it "has grave concerns regarding the scope of

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205 EarthLink's DSL & Home Phone service offers residential consumers three bundles of voice and DSL services with differing voice usage amounts, premium calling features, and broadband speeds at $49.95 to $69.95 per month. *See* http://www.earthlink.net/voice/bundles/dslhomephone/.

206 *See* Covad Completes Build-Out of Nation's Largest Next Generation Telecommunications Network Ahead of Schedule (Dec. 27, 2006) *available at* http://www.covad.com/companyinfo/pressroom/pr_2006/12_27_06.pdf.

Qwest's Seattle Petition and the adverse effects it will have on competition if granted in whole."[207] The Washington Commission noted its statutory authority to regulate telecommunications companies in the public interest and indicated that although it has "actively responded to efforts by [ILECs], particularly Qwest, to reduce, streamline or eliminate state regulation where conditions warrant," the "vast scope" of the relief Qwest is seeking, "if granted, would undercut the very foundation and delicate balance of the UTC's past decisions."[208] In the expert opinion of the Washington Commission, "forbearance from Section 251(c)(3) throughout the Seattle MSA [would be] contrary to the public interest."[209]

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207 *UTC Comments*, at 2.

208 *Id.*, at 2-3.

209 *Id.*, at 5.

VIII. CONCLUSION

For all of the forgoing reasons, Qwest's Petitions should be dismissed. If the Commission declines to dismiss the Petitions, it must deny Qwest the regulatory relief it seeks on the ground that Qwest has not met the statutory prerequisites for forbearance contained in Section 10 of the Act.

Respectfully submitted,

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